

VERBATIM <sup>1</sup>

RECORD OF TRIAL <sup>2</sup>

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

Headquarters and  
Headquarters Company,  
United States Army Garrison  
(Unit/Command Name)

(Social Security Number)

U.S. Army

(Branch of Service)

PFC/E-3

(Rank)

Fort Myer, VA 22211

(Station or Ship)

By

GENERAL

COURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

Date or Dates of Trial:

23 February 2012, 15-16 March 2012, 24-26 April 2012, 6-8 June 2012, 25 June 2012, 16-19 July 2012, 28-30 August 2012, 2 October 2012, 12 October 2012, 17-18 October 2012, 7-8 November 2012, 27 November - 2 December 2012, 5-7 December 2012, 10-11 December 2012, 8-9 January 2013, 16 January 2013, 26 February - 1 March 2013, 8 March 2013, 10 April 2013, 7-8 May 2013, 21 May 2013, 3-5 June 2013, 10-12 June 2013, 17-18 June 2013, 25-28 June 2013, 1-2 July 2013, 8-10 July 2013, 15 July 2013, 18-19 July 2013, 25-26 July 2013, 28 July - 2 August 2013, 5-9 August 2013, 12-14 August 2013, 16 August 2013, and 19-21 August 2013.

<sup>1</sup> Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

<sup>2</sup> See inside back cover for instructions as to preparation and arrangement.

## WITNESSES/EVIDENCE

The United States requests this Court consider the following: (1) the referred charge sheet, (2) Enclosures 1-7, and (3) the Forensic Report for the accused's primary SIPRNET computer (BATES 00211066-00211069 or pp. 30-33 of the report).

## LEGAL AUTHORITY AND ARGUMENT

The defense argues that the United States has failed to allege the accused "exceeded authorized access" within the meaning of 18 U.S.C. § 1030(a)(1). The defense argument has no merit. The Government's theory is that the accused "exceeded authorized access" when he violated the Government's explicit purpose-based access restriction on his SIPRNET computer. For the reasons set forth below, this theory of criminal liability under § 1030(a)(1) is consistent with the plain meaning of the statutory text, the legislative history, and case law interpreting the phrase "exceeds authorized access" in the context of prosecutions under § 1030.<sup>1</sup>

### I. THE STATUTORY TEXT IS CLEAR AND UNAMBIGUOUS.

The defense claims the United States has failed to state an offense because, under the plain language of 18 U.S.C. § 1030(a)(1), the accused did not "exceed his authorized access." Def. Mot. at 4. The defense argument has no merit—the plain language of the statutory text clearly supports the Government's theory or interpretation of "exceeds authorized access."

The starting point for statutory interpretation is the plain or ordinary meaning of the language. See *United States v. McCollum*, 58 M.J. 323, 340 (C.A.A.F. 2003); see also *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) ("[w]hen the statute's language is plain, the sole function of the courts...is to enforce it according to its terms"); 2A Sutherland Statutory Construction § 45:2 (7th ed.) ("a statute, clear and unambiguous on its face, need not and cannot be interpreted by a court"); *United States v. James*, 63 M.J. 217, 221 (C.A.A.F. 2006) ("a fundamental rule of statutory interpretation is that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there'") (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). When a statute is clear and unambiguous, courts need not and should not consult the legislative history. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); see also *United States v. Aleynikov*, 737 F. Supp. 2d 173, 177 (S.D.N.Y. 2010) ("When the statutory language is clear, there is no need to examine the statutory purpose, legislative history, or the rule of lenity.")

An individual "exceeds authorized access" under the Computer Fraud and Abuse Act (CFAA) and 18 U.S.C. § 1030(a)(1) when the individual "access[es] a computer with

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<sup>1</sup> To the extent the United States did not clearly articulate its theory during oral argument on 23 February 2012, this brief, along with the theory presented during the Article 32 Investigation, should be considered the definitive source clarifying the Government's theory for "exceeding authorized access" on a SIPRNET computer.

authorization and...use[s] such access to obtain or alter information in the computer that the accessor is not entitled *so* to obtain or alter.” 18 U.S.C. § 1030(e)(6) (emphasis added). The defense argues that a person exceeds authorized access only when he or she uses authorized access to a computer to obtain or alter information that he or she is never entitled to obtain or alter. See Def. Mot. at 3. The problem with this interpretation, however, is that the defense completely ignores the meaning of the word “so” in the definition.

“So” means “[i]n the state or manner indicated or expressed.” *Webster’s II New Riverside University Dictionary* 1102 (1988). The presence of “so” after “entitled” in § 1030(e)(6) makes the definition unambiguous—an individual “exceeds authorized access” when he or she obtains or alters information that he or she is not entitled to obtain or alter *in those circumstances*. Put another way, the word “so” clarifies that the user might have been entitled to obtain the information *in some other circumstances*, but not in that manner or under those circumstances. See 18 U.S.C. § 1030(e)(6) (“not entitled *so* to obtain or alter”) (emphasis added). Thus, “exceeds authorized access” under § 1030(e)(6) clearly contemplates exceeding authorized access by violating an employer’s purpose-based access restriction on a computer and obtaining information that, under those circumstances, the accused was not entitled to obtain.

The defense motion offers no explanation for Congress’ decision to include the word “so” in the definition. In fact, they fail to mention the word completely when defining what constitutes “exceeding authorized access.” See Def. Mot. at 5-6 (“A person exceeds authorized access under Section 1030(a)(1) when despite being authorized to use the computer, the accused uses his access to the computer to obtain or alter information in the computer that he is not entitled to obtain or alter.”) (“An accused exceeds authorized access under Section 1030(a)(1) when, despite being authorized to use the computer, the accused uses his access to the computer to obtain or alter *information* in the computer that he is not entitled to obtain or alter.”). Although the defense does not address the issue, the only conclusion that can be reached is that they consider the word “so” to be superfluous. To the extent the defense interpretation is that the term has no independent meaning or significance, this is improper. See *Corley v. United States*, 556 U.S. 303, 314 (2009) (“The fundamental problem with the Government’s reading of [the statute] is that it renders [a provision] nonsensical and superfluous.”). When a statute is construed, effect should be given to all its provisions so that no part is inoperative or superfluous. *Id.*

The statutory definition of “exceeds authorized access” is clear and unambiguous. The word “so” is not superfluous and was included in the definition by Congress for a reason. Accordingly, the defense motion should be denied because of the plain meaning of the statutory text.

## II. THE LEGISLATIVE HISTORY SUPPORTS THE GOVERNMENT’S THEORY.

Assuming, *arguendo*, the statutory text is ambiguous, the relevant legislative history confirms the Government’s interpretation of § 1030(a)(1) and “exceeds authorized access.” In 1984, Congress enacted 18 U.S.C. § 1030 to address federal computer-related offenses in a single new statute. See Counterfeit Access Device and Computer Fraud and Abuse Act of 1984,

Pub. L. No. 98-473, sec. 2102(a), 98 Stat. 1837 (1984). The 1984 version of 18 U.S.C. § 1030(a)(1) punished knowingly accessing a computer "without authorization," or accessing a computer with authorization and using the opportunity "such access provides for purposes to which such authorization does not extend...." *Id.* As evidenced by the language of the original statute, Congress clearly contemplated purpose-based restrictions on computer access, like the purpose-based restriction presented by the facts in this case. *See* Enclosure 2.

In 1986, Congress passed the "Computer Fraud and Abuse Act," which added to and amended 18 U.S.C. § 1030. *See* Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (1986). Specifically, the term "exceeds authorized access" was introduced to § 1030(a)(1) and (2). *Id.* at § 2(g)(6). As the Senate Report for the 1986 bill explained:

Section 2(c) [of the 1986 bill] substitutes the phrase 'exceeds authorized access' for the more cumbersome phrase in present 18 U.S.C. § 1030(a)(1) and (2), 'or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend'. The Committee intends this change to simplify the language in 18 U.S.C. § 1030(a)(1) and (2), and the phrase 'exceeds authorized access' is defined separately in Section 2(g) of the bill.

S. Rep. No. 99-432, pt. 3, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2486.

In short, the Senate Report for the 1986 bill is clear—the phrase "exceeds authorized access" was substituted for the "more cumbersome phrase" in the 1984 version of 18 U.S.C. § 1030(a)(1). *Id.* Congress intended the change to "simplify the language in 18 U.S.C. § 1030(a)(1) and (2)," not wildly alter what type of conduct would be criminalized by the 1986 version of § 1030(a)(1). *Id.* Purpose-based restrictions, like those encompassed by the charged conduct in this case, continued to exist in the shorter and simpler phrase "exceeds authorized access."<sup>2</sup>

The defense asks this Court to scrutinize the section of the Senate Report entitled "Additional Views of Messrs. Mathias and Leahy." *See* Def. Mot. at 9; S. Rep. No. 99-432, pt. 8, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2493-96. Specifically, the defense cites to specific language from that section and argues that the "stated reason for the amendment was to 'eliminate coverage for authorized access that aims at purposes to which such authorization does not extend.'" Def. Mot. at 9 (quoting S. Rep. No. 99-432, pt. 8, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2494). The defense fails to recognize that this section was devoted to a discussion of the scope of 18 U.S.C. § 1030(a)(3), not § 1030(a)(1) or (2). *See* S. Rep. No. 99-432, pt. 8, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2494 (discussing the "three salutary features" of the revised § 1030(a)(3)). Senators Leahy and Mathias used this section to express their individual concerns that the 1984 version of § 1030(a)(3) encompassed "all computerized government information, including documents that must, under the Freedom of Information Act (FOIA), be

<sup>2</sup> Indeed, the defense notes that "[t]he language in the prior statute covered this situation perfectly; it criminalized the scenario where a person 'uses the opportunity that such [authorized] access provides for purposes to which such authorization does not extend.'" Def. Mot. at 9 (quoting Pub. L. No. 98-473, sec. 2102(a)).



disclosed to any member of the public upon proper request.” S. Rep. No. 99-432, pt. 8, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2494. The Senators believed the 1984 version of § 1030(a)(3) was “murky” because it potentially criminalized the conduct of a federal employee who, in response to a hypothetical FOIA request, accesses a computerized database without understanding the precise scope of their authorization. *See id.* As the Senators explained, a federal employee might resolve doubts about the scope of their authorization in those cases by refusing to disclose information under FOIA, “a conclusion directly contrary to the principles of open government underlying the FOIA.” *Id.* The Senators’ concerns were fully addressed by the 1986 bill, which restricted the scope of § 1030(a)(3) to punishing access to Government computers that occurred “without authorization.” *See id.*; *see also* 18 U.S.C. § 1030(a)(3).

As evident from the record, Senators Mathias and Leahy did not believe the concept of exceeding authorized access was problematic, because they approved of a bill that preserved that basis for liability in § 1030(a)(1) and (2), and included it in a new provision, § 1030(a)(4). *See* 18 U.S.C. § 1030. They specifically recognized that a federal employee’s “access to computerized data might be legitimate in some circumstances,” but that in other circumstances, the employee “might be held to exceed his authorization.” S. Rep. No. 99-432, pt. 8, *reprinted in* 1986 U.S.C.C.A.N. 2479, 2494-95. The Senators may have been concerned about imposing criminal liability on an individual for “exceeding authorized access” under § 1030(a)(3), but they had no similar concerns with respect to imposing liability under § 1030(a)(1), (2), and (4). Indeed, their discussion of the three “salutary” features of the revised § 1030(a)(3) acknowledged that other sections of 18 U.S.C. § 1030 would still be available to punish abuses of authorized access to federal computers. *See id.* (“As the committee report points out, administrative sanctions should ordinarily be adequate to deal with real abuses of authorized access to Federal computers (assuming of course, that no other provision of section 1030 is violated).”).

The legislative history of the CFAA confirms that “exceeds authorized access” encompasses those individuals who access computer data in violation of an express purpose-based restriction on access. Senators Mathias and Leahy were abundantly clear that their concerns about the 1984 version of § 1030 were limited to the scope of § 1030(a)(3), and not § 1030(a)(1) and (2). *See id.* (“Among the many improvements that it would make is a complete revision of section 1030(a)(3).”).

### III. FEDERAL CASE LAW INTERPRETING “EXCEEDS AUTHORIZED ACCESS” SUPPORTS THE GOVERNMENT’S THEORY.

The Government’s interpretation of “exceeds authorized access” is consistent with decisions from the Fifth and Eleventh Circuits, which have held that employees who violate clear company computer restriction agreements “exceed authorized access” under the CFAA. For example, in *United States v. John*, the Fifth Circuit held that an employee of Citigroup exceeded her authorized access in violation of § 1030(a)(2) when she accessed confidential customer information in violation of her employer’s use restrictions and used that information to commit fraud. *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010). In *John*, the evidence demonstrated that the defendant was aware, through company training programs, of Citigroup’s official policy prohibiting misuse of the company’s internal computer systems and confidential

customer information. *Id.* As the Fifth Circuit noted, “[a]ccess to a computer and data that can be obtained from that access may be exceeded if the purposes for which the access has been given are exceeded.” *Id.* Similarly, in *United States v. Rodriguez*, the Eleventh Circuit held that an employee of the Social Security Administration (SSA) exceeded his authorized access under § 1030(a)(2) when he obtained personal information about former girlfriends and potential paramours and used that information to send the women flowers or to show up at their homes. *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2007). The evidence at trial showed that the SSA had established a policy that prohibited employees from obtaining information from its databases without a business reason. *Id.* at 1260. The SSA provided notice to employees through mandatory training sessions, notices posted in the office, and a banner that appeared on every computer screen daily. *Id.*

The reasoning of the Fifth and Eleventh Circuits is supported by the decisions of other courts as well. See, e.g., *Cont'l Group, Inc. v. KW Prop. Mgmt., LLC*, 622 F. Supp. 2d 1357, 1372 (S.D. Fla. 2009) (computer access policies stated that computers were provided “for business use” and were “to be used solely for the [authorizing party’s] purposes”); *United States v. Salum*, 257 Fed. Appx. 225, 227 (11th Cir. 2007) (officers could access NCIC system only for official business of criminal justice agency); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 242-43, 248 (S.D.N.Y. 2000), *aff’d*, 356 F.3d 393 (2d Cir. 2004) (in order to submit query to website, users must agree not to use responsive data for direct marketing activities); *United States v. Czubinski*, 106 F.3d 1069, 1071 (1st Cir. 1997) (“[IRS] employees may not use any Service computer system for other than official purposes.”).

The defense asks this Court to adopt the interpretation of “exceeds authorized access” favored by the en banc Ninth Circuit Court of Appeals in *United States v. Nosal* (*Nosal III*), 2012 WL 1176119 (C.A.9 (Cal.)). See Def. Mot. at 12. *Nosal III* held that the phrase “exceeds authorized access” in the CFAA does not extend to violations of use or access restrictions. *Nosal III*, 2012 WL 1176119, at 7. However, *Nosal III* is seriously flawed for several reasons. First, while the majority acknowledged that the CFAA was “susceptible to the government’s broad interpretation” of the statutory text, the court found the defendant’s narrower version more plausible—and immediately launched into a parade of horrors that would ensue if the statutory text was given the government’s interpretation. See *id.* at 3-6. In fact, the *Nosal III* majority spent much of the opinion considering scenarios not presented by the facts of the case—what the dissent called “far-fetched hypotheticals involving neither theft nor intentional fraudulent conduct, but innocuous violations of office policy.” *Id.* at 8 (Silverman, J., dissenting). As the dissent noted, the majority was preoccupied by the potential vagueness of other sections of the CFAA, when the majority should have “wait[ed] for an actual case or controversy to frame these issues, rather than posit a laundry list of wacky hypotheticals.” *Id.* at 10 (Silverman, J., dissenting); see also *infra* Part V (discussing vagueness analysis).

Second, while the majority considered the narrower interpretation of the legislative history the “more sensible reading,” they failed to seriously consider, beyond a short footnote, the legislative history with respect to Congress’ intent to substitute a simpler phrase (exceeds authorized access) for “a more cumbersome phrase” in the 1984 version. See *id.* at 3; see also *supra* Part II (discussing the Senate Report for the 1986 bill). Instead, the majority simply stated that because one of the reasons for the 1984 bill was to address computer hacking, it is

"possible" to read both prohibitions ("without authorization" and "exceeding authorized access") as applying to hackers. *Nosal III*, 2012 WL 1176119, at 3. In the majority's view, "without authorization" would apply to "inside" hackers, and "exceeds authorized access" would apply to "outside hackers." *Id.* While the majority found this construction "plausible" or "possible," those words practically scream ambiguity. *See id.* Thus, the majority chose to neglect other methods of statutory interpretation, specifically legislative history, when led down that path by their own analysis.

Although the facts of the *Nosal* case are similar to those presented by this case, the other cases cited by the defense are not relevant to this Court's inquiry. *See* Def. Mot. at 6, 9, 11-12 (listing cases in support of the defense interpretation); *see also United States v. Nosal (Nosal II)*, 642 F.3d 781, 782-83 (9th Cir. 2011) (summarizing facts of *Nosal*). As the *Nosal II* court noted, the defendant was subject to a computer use policy that placed clear and conspicuous restrictions on his access to the system and to a database in particular. *See id.* at 787. The other cases cited by the defense did not consider such explicit purpose-based restrictions or limitations on computer access. *See, e.g., Aleynikov*, 737 F. Supp. 2d at 175 ("Among other things, Goldman employees were required to execute a confidentiality agreement..."); *Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 498 (D.Md. 2005) ("Defendant Werner-Matsuda signed a Registration Agreement stipulating not to use the information provided through VL lodge for any purpose that would be contrary to the policies and procedures established by the [IAM] Constitution."); *Walsh Bishop Assocs., Inc. v. O'Brien*, 2012 WL 669069, No. 11-2673 (DSD/AJB) (D.Minn. Feb. 28, 2012) ("Walsh Bishop argues that a person exceeds authorized access by accessing information in order to use it in a manner contrary to an employer's interests and use policies."); *Xcedex, Inc. v. VMware, Inc.*, 2011 WL 2600688, No. 10-3589 (PJS/JJK) (D.Minn. June 8, 2011). In short, the courts in the representative cases cited by the defense did not consider explicit purpose-based restrictions on computer access like this case and the *John* and *Rodriguez* cases.

This Court should reject the *Nosal III* interpretation of "exceeds authorized access" and adopt the reasoning of the Fifth and Eleventh Circuits. *Nosal III*, as source of precedent, is severely flawed. The majority improperly considered hypotheticals and scenarios not presented by the facts of the case and ignored relevant legislative history bearing on the issue. The other cases cited by the defense are not on point.

#### IV. RULE OF LENITY DOES NOT APPLY.

The defense argues that in cases where there are two possible interpretations of a statute – one broad and one narrow – courts should apply the rule of lenity and adopt the narrow interpretation. Def. Mot. at 20. Although the statutory text and legislative history are clear in this case and support the interpretation of the United States, the simple existence of some statutory ambiguity is not sufficient to warrant application of the rule of lenity. *Muscarello v. United States*, 524 U.S. 125, 138 (1998). Most statutes are ambiguous to some degree; thus the "mere possibility of articulating a narrower construction...does not by itself make the rule of lenity applicable." *Id.* (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)). The Supreme Court has stated that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a 'grievous ambiguity or uncertainty in the statute,' such that the


Court must simply guess as to what Congress intended.” *Barber v. Thomas*, 130 S. Ct. 2499, 2508-09 (2010) (quoting *Muscarello*, 524 U.S. at 139). In this case, there is no grievous ambiguity or uncertainty. If the Court is not convinced that “so” has independent meaning, the legislative history is clear on the issue of what interpretation to give “exceeds authorized access” in § 1030—Congress explained that the phrase was substituted for the “more cumbersome” phrase encompassing purposed-based restrictions. See *supra* Part II. In short, the problem posed by statutory interpretation in this case is no different from any other case. The rule of lenity does not stand for the proposition that the accused automatically wins in cases of ambiguity. See *Muscarello*, 524 U.S. at 139 (“Yet, this Court has never held that the rule of lenity automatically permits the defendant to win.”)

#### V. THE ACCUSED DOES NOT HAVE STANDING TO RAISE VAGUENESS CHALLENGE.

Finally, the defense argues that the Government’s “expansive interpretation” of “exceeds authorized access” puts a provision of § 1030 in constitutional jeopardy—specifically by rendering a sub-paragraph of § 1030(a)(2) void-for-vagueness. See Def. Mot. at 21-22. However, the accused is not charged with this allegedly vague provision. The only provision at issue in this case – § 1030(a)(1) – is also the only provision the accused may challenge for vagueness, as it is applied to him. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (“A [party] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718-19 (2010) (quoting *Vill. of Hoffman*); *United States v. Kim*, 808 F. Supp. 2d 44, 52 (D.D.C. 2011) (“Defendant was not charged under the retention clause [of § 793(d)] and therefore he lacks standing to challenge it on vagueness grounds.”). In short, the defense may not argue that a statutory interpretation renders an entirely different provision of § 1030 unconstitutionally vague, nor can he argue vagueness with respect to hypothetical applications of § 1030(a)(1). Void-for-vagueness challenges must be limited to the facts of the accused’s own case. An interpretation of a phrase under § 1030(a)(1) that may lead to absurd results under another provision of § 1030 is irrelevant to the issues before this Court. Accordingly, this Court should decline to consider the defense arguments relating to vagueness.

### CONCLUSION

The United States respectfully requests this Court DENY the defense motion to dismiss Specifications 13 and 14 of Charge II. For the reasons stated above, the United States has adequately stated an offense punishable under 18 U.S.C. § 1030(a)(1). In the alternative, the United States requests the Court either defer ruling on this motion until the presentation of evidence, or simply amend the specifications to leave the lesser-included offenses charging violations of clauses 1 and 2 of Article 134, Uniform Code of Military Justice.

  
JODEAN MORROW  
CPT, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 24 May 2012.

  
JODEAN MORROW  
CPT, JA  
Trial Counsel

7 Encls

1. Article 32 Testimony of SA David Shaver
2. Accused's SIPRNET Warning Banner
3. Continuation Sheet, DD Form 457, pp. 29-32
4. Washington Post, dtd 31 Dec 12, *Cables Leak Reveals Flaws of Information-Sharing Tool*
5. AIR of SA Mander, dtd 5 Jan 11
6. Excerpt of AR 25-2, dtd 24 Oct 07
7. Accused's Non-Disclosure Agreements

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 $\mathbf{V}_i$ 

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 1**  
**24 May 2012**

9 SPECIAL AGENT DAVID SHAVER, Civilian, was called as a witness  
10 for the prosecution, was sworn, and testified in substance as  
11 follows:  
12

13 DIRECT EXAMINATION  
14

15 Questions by assistant trial counsel 1:  
16

17 I work for the Army Computer Crimes Investigative Unit. I  
18 began working for them in 1999, at the time I was in the  
19 military as a CID agent and an investigator. I am in a  
20 supervisory position now, I am the Special Agent in charge of  
21 the digital forensics and research branch. Our job is to  
22 conduct examinations of digital media in support of CCIU cases.  
23 The primary mission is to investigate any intrusion into any  
24 Army computer worldwide, however we are tasked to do other  
25 stuff.  
26

27 I have received training from several locations. The first  
28 would be the Law Enforcement Training Center, in Glencoe,  
29 Georgia; the Defense Cyber Crime Center in Maryland, and I have  
30 been trained on various commercial products as well. Products  
31 such as a forensic product called ENCASE, which is a computer  
32 forensic program that allows you to examine digital media. I  
33 received training on Windows, Unix, Linux, and Macintosh. I  
34 hold several certifications; I am a certified computer crime  
35 investigator, an ENCASE certified examiner, A+ and net plus.  
36 The A+ certification is a hardware-based certification. Net  
37 Plus is a network-based certification. I have published  
38 articles related to the field of computer forensics. I co-  
39 authored a chapter on Windows forensics in the handbook of  
40 digital forensics investigations. I have given several  
41 scholarly presentations. A virtual machine is where we  
42 developed a process to take a forensic image and turn it into a  
43 virtual machine on your host computer. By using a virtual  
44 machine you can gain the perspective of examining the computer  
45 as a subject has used it.  
46

1 I was notified of this case in late May of 2010, I examined  
2 pieces of media related to this case. The first things I  
3 examined were two SIPR computers. They were his primary and  
4 secondary computers. An IP is an Internet protocol address,  
5 which is a set of numbers that are unique to each computer. I  
6 am familiar with Intelink, Intelink is Google of the SIPRNET. I  
7 examined Intelink logs, those log files ranged from October 2009  
8 until May 2010. From the logs I was able to obtain the majority  
9 of the activity that happened on the computer. I identified  
10 some kind of query and then I ran a search against log files for  
11 that query, after that I verified it as well. I put them into  
12 an Excel spreadsheet for ease of review. I noticed that there  
13 were a lot of searches that seemed out of place, the keyword  
14 searches that he was using seemed out of place for his job.

15  
16 [The trial counsel published screenshot documents for the  
17 witness to view on a monitor.]

18  
19 That is a screenshot of the Excel spreadsheet that I  
20 created called keywords. It is a filtered spreadsheet of the  
21 keyword searches for WikiLeaks. From November 2009 through May  
22 2010, I found over one hundred searches for WikiLeaks under PFC  
23 Manning's profile. This is a different screenshot from that  
24 same Excel spreadsheet; this time we filtered on the keyword  
25 Iceland. The first search for Iceland was 9 January 2010, it is  
26 only filtered on the keyword Iceland and this came from PFC  
27 Manning's profile. This is another screenshot from the same  
28 Excel spreadsheet; this time I filtered on the keyword  
29 retention, and it was searching for the retention of  
30 interrogation videos. That search was done 28 November 2009,  
31 that was the first time that he searched for it.

32  
33 The Intelink program also the captured the use of a WGET  
34 program to download a large number of files. WGET is a command  
35 line utility to download files from a Web server. Command line  
36 means it is non graphical, meaning that you have to open up a  
37 command prompt and then you are able to type the commands, it is  
38 like a DOS program. WGET is not a standard program on an Army  
39 computer. As part of my job to investigate intrusions, I get a  
40 list of authorized software and WGET is not on that list. The  
41 first time that I saw PFC Manning access WGET was March of 2010.  
42 This is another portion of the screenshot of the Excel  
43 spreadsheet that I created for Intelink. This portion is  
44 filtered on the word WGET. The server in question was a  
45 SharePoint server, so it stores files by ID number, it is a  
46 database. The numbers beside the file ID number represent the  
47 action that was taken for the searches, if a document was



1 downloaded, if the search came back, file not found, things of  
2 that nature. There were over seven hundred examples of the  
3 computer using WGET commands for the month of March pertaining  
4 to JTF Guantánamo Bay detainee suspects. I know this because I  
5 downloaded the same documents using the same program, and I used  
6 the same path. And I know that they were the same documents  
7 that were on the WikiLeaks website because I compared the two.

8  
9 When we conduct a forensic examination, the first thing we  
10 do is we verify the hashes, that the acquisition matches their  
11 verification hashes. We scan the computer for antivirus and  
12 then we generally conduct keyword searches. So when I began my  
13 forensic examination the first thing that I look at is the hash  
14 values of the images. The hash values have to match because if  
15 they don't match, then there is a problem with the image. The  
16 hash values of the acquiring image and of the image that I  
17 looked at matched. The primary tools that I use to examine  
18 computers are ENCASE. I plug keywords into ENCASE and then I  
19 search for keywords, I search both the allocated and the  
20 unallocated spaces. Allocated space is places on the hard  
21 drive, files that are created that you can see, such as a Word  
22 document or e-mail. Unallocated space is places on the hard  
23 drive which have not been used yet or it may contain deleted  
24 files. I was also able to recover deleted files, because  
25 deleted files are still on the hard drive until something is  
26 written over top of them.

27  
28 With respect to the [dot] .22 computer, I was given a  
29 series of chat logs, they were statements concerning the  
30 Department of State, JTF Guantánamo Bay Cuba, things like that,  
31 so that is where I started my keyword list. The chat logs were  
32 collected from Mr. Lamo, I was looking for things that were  
33 identified in the chat logs. I did a search in the allocated  
34 space, and I found four complete JTF Guantánamo Bay, Cuba  
35 detainee assessments. I knew that they were detainee  
36 assessments because I read them. They were under PFC Manning's  
37 user profile. This computer had two web browsers on it,  
38 Internet Explorer and Firefox. The configuration for the  
39 Internet explorer web browser was a standard Army configuration  
40 where the user could not clear the Internet history. The  
41 Internet history on a Windows computer would be stored in a file  
42 called index.dat. It stores Internet information as well as  
43 files that were opened up on the computer. The other web  
44 browser on the computer was Firefox, it was configured to have  
45 Intelink as its homepage and to auto start private browsing when  
46 it started.

1 I found a [dot] .zip file under PFC Manning's user profile  
2 and inside of it were over ten thousand complete Department of  
3 State cables, web pages. I also found an Excel spreadsheet, it  
4 was a spreadsheet with three tabs, the first tab was WGET, the  
5 second tab was 0310-0410, and the third tab was 0510. In the  
6 second tab was Department of State message record numbers that  
7 were published between March 2010 until April 2010, they were  
8 sequential, whoever did this was obviously keeping track of  
9 where they were, the first number was 251,288, and then a  
10 sequential number after that. To my knowledge WikiLeaks has  
11 released 251,287 cables. On a third tab it was all of the  
12 Department of State cables that were published in May 2010. It  
13 was just message record numbers not the full cable.

14  
15 There was a WGET tab in there as well, it was over ten  
16 thousand message record numbers, the second column was the  
17 command line using WGET that downloaded that message record  
18 number from the Department of State net centric server. The  
19 first column is the message record number, and there's about ten  
20 thousand there. The next column is a script, it's a  
21 mathematical computation basically saying take everything that  
22 is in column A and put it in column B, but in the right path.

23  
24 The Investigating Officer stated that it would be easier to  
25 understand if they were able to see the document that the  
26 witness was talking about.

27  
28 The trial counsel informed the Investigating Officer that  
29 although the document is not classified it is currently marked  
30 as classified and that is the reason why he was not able to  
31 display the document in open court.

32  
33 The defense counsel objected to all parties viewing the  
34 document from the jury box stating that it would be better for  
35 everyone to recess and reconvene tomorrow when the problem is  
36 fixed.

37  
38 The trial counsel stated that his direct line of  
39 questioning would not take that much longer and requested to  
40 continue with the questioning of this witness.

41  
42 The Investigating Officer stated that it would be better  
43 for all if the trial counsel just continued with his line of  
44 questioning explaining the document in detail.

1 The trial counsel gave the document number to the  
2 Investigating Officer so that he would be able to review it once  
3 he went back to his chambers.  
4

5 **The direct examination by Assistant Trial Counsel 1 continued as**  
6 **follows:**  
7

8 In Column B it is an Excel formula, to take what is in  
9 Column A and put it in to a script so it could identify the  
10 file. After you have all of column B filled, you would be able  
11 to copy that column as text and put it in a batch file; and run  
12 the batch file in a command script. There were about ten  
13 thousand commands in that batch, and I saw those message record  
14 numbers on the left, they were downloaded into the original zip  
15 file I discussed earlier.  
16

17 This is all under PFC Manning's user profile. In the  
18 Windows prefetch folder there were several instances of WGET  
19 being run. Prefetch is a Windows feature to speed up the  
20 computer. The computer will identify programs that you use on a  
21 regular basis, so the next time you run the program it will load  
22 quicker. You can run that program WGET at the same time from  
23 various locations; that way you will be able to download a lot  
24 of files simultaneously.  
25

26 WGET was in PFC Manning's profile, it appeared 4 May 2010.  
27 It was not the first time that he used that file because there  
28 were prefetch files predate that. Within the Windows temp  
29 folder there were two files, these files each contained  
30 approximately 100 complete Department of State cables, these  
31 files were in CSV format and they contained a base 64 encoded  
32 version of the cables. A CSV file is a Comma Separated Value.  
33 It is just a way of moving files from one database to another.  
34 Base 64 is an encoding scheme, it transforms data and documents  
35 into a different format. Someone would do that to streamline  
36 the process of taking the cables out; it took away all the  
37 punctuation, all the spacing, and just put the information in  
38 straight base 64. I found evidence in the unallocated space; I  
39 identified thousands of the State Department complete cables.  
40 They were unclassified or secret. They were not all complete.  
41

42 Other information that I found relating to detainee  
43 information was ISNs, the Internment Serial Numbers, which are a  
44 unique pattern of characters. I did a search for them and I  
45 found hundreds of documents with that convention. The ISN is  
46 the internment serial number and is used as an identifier. I

1 found ISNs on PFC Manning's computer. They were found in the  
2 index.dat file.

3  
4 I am familiar with the charges and specifications. I found,  
5 in the allocated space, the movie, actually several movies; one  
6 was the released version from WikiLeaks and there was another  
7 version which appeared to be the source file for it. The first  
8 instance of that video being there was March, through  
9 examination of the restore points I was able to determine that.  
10 Restore point is another Microsoft feature and they are created  
11 when an operating system is updated or program is installed so  
12 if there's a problem with the computer you can go back in time  
13 and get your computer to work again.

14  
15 I do recognize that image, this is a screenshot of the  
16 ENCASE program displaying from left to right the filename which  
17 is the restore point, the middle column shows you the 12 July  
18 2007 CZ engagement zone file was present under PFC Manning's  
19 profile. I believe the first time it was viewed was 2 March  
20 2010. There were no restore points before the month of March  
21 due to the fact that the computer had problems and it was  
22 reimaged prior to that.

23  
24 I found information relating to an investigation done on a  
25 military operation in Afghanistan. Within the index.dat file  
26 there were hundreds of files which appeared to be part of the  
27 incident, and I recovered deleted PDFs and JPEG images  
28 pertaining to the Gharani incident. That is an image of the  
29 index.dat which I put into an Excel spreadsheet for ease of  
30 viewing. It is just a snippet of it. From left to right you  
31 have the date column and to the right of that you have the URL,  
32 what sites were visited. The date is April 10, 2010, says  
33 Bradley.Manning as a file. That means that it is a file on the  
34 computer not a website and then you continue reading and it  
35 gives the path. It appears that somebody using the  
36 Bradley.Manning user profile downloaded a large number files  
37 concerning the Farah incident and at the end created a  
38 Farah.zip. All of this was time sequential. In unallocated  
39 space I recovered numerous JPEG images and PDF files, they  
40 appear to be from presentations, screenshots of presentations,  
41 pictures from aircraft, reconnaissance over the combat zone.

42  
43 [The witness was temporarily excused, duly warned, and  
44 withdrew from the courtroom.]

45  
46 [The Article 32 hearing recessed at 1834, 18 December  
47 2011.]

1  
2 [The Article 32 hearing was called to order at 0934, 19  
3 December 2011.]  
4

5 The Investigating Officer called the hearing to order, and  
6 stated that all parties present prior to the recess were once  
7 again present.  
8

9 **SPECIAL AGENT DAVID SHAVER, Civilian, was recalled as a witness**  
10 **for the prosecution, was reminded that he was still under oath,**  
11 **and testified in substance as follows:**  
12

13 **CROSS-EXAMINATION**  
14

15 **Questions by the civilian defense counsel:**  
16

17 I did the computer forensics on both of the computers that  
18 were sent to my office that PFC Manning used. I did not do a  
19 bit by bit analysis of all the SIPR computers in the SCIF. I do  
20 not know the total number of SIPR computers in the SCIF. I do  
21 not know if the program WGET was on the other computers.  
22

23 WGET is a program that is used for data mining, a key job  
24 for analysts is to do data mining. Yesterday I stated that  
25 WikiLeaks released over 250,000 cables. And during my analysis  
26 I found diplomatic cables in the file called files.zip, that  
27 file was found in allocated computer space. I did not compare  
28 the cables that I found in the file with the cables that were on  
29 the WikiLeaks website. None of those cables that I found in the  
30 files.zip folder were on the WikiLeaks website. The computer  
31 that I found these cables on was a SIPR computer. I was not  
32 aware that analysts were directed to look at these cables. I  
33 was not aware that no password was required to access these  
34 files. I did not know that there was no prohibition for any  
35 analyst to download these files.  
36

37 Generally, you cannot date and timestamp things that are in  
38 the unallocated space. And with unallocated space there is  
39 nothing that you can tie to one particular user. I found the  
40 video that has been called the Apache video; it was on one of  
41 the SIPR computers. I did not know that the Apache video was a  
42 topic of discussion among the analysts at FOB Hammer. I did not  
43 know that these analysts were talking about and watching this  
44 certain video back in December 2009. If a file has been deleted  
45 and the space that was allocated and has been written over I  
46 cannot find out what that file was. I testified that WGET was  
47 used to download hundreds of files onto the allocated space of

1 the computer. In the allocated space I found four detainee  
2 assessments, and in the unallocated space I found zero.

3  
4 **REDIRECT EXAMINATION**

5  
6 **Questions by Assistant Trial Counsel 1:**

7  
8 The cables in the files.zip folder were not released.

9  
10 **OBJECTION**

11  
12 The defense counsel objected to the line of questioning  
13 stating it was cause for speculation.

14  
15 The Investigating Officer overruled the defense's  
16 objection.

17  
18 **The redirect examination by the trial counsel continued as**  
19 **follows:**

20  
21 When the files.zip was created there was something wrong,  
22 there was a problem with it, if a person using WinZip tried to  
23 open it, it would not open because it was a corrupted file. So  
24 you would need special tools in order to open the files in that  
25 zip folder.

26  
27 **OBJECTION**

28  
29 The defense counsel objected stating the trial counsel was  
30 asking leading questions.

31  
32 The Investigating Officer sustained the objection.

33  
34 **The redirect examination by the trial counsel continued as**  
35 **follows:**

36  
37 I did find files related to the Farah investigation in the  
38 unallocated space. I found four detainee assessments in the  
39 allocated space. I did find evidence of the detainee  
40 assessments in the index.dat file folder. The detainees have a  
41 unique naming system, the ISN, I looked for the pattern for that  
42 and there were hundreds of those in the index.dat. The  
43 index.dat file is a Microsoft file used to log all of the  
44 websites and files viewed by the user.

45  
46 **RECROSS-EXAMINATION**

1 Questions by the civilian defense counsel:

2  
3 I was not able to open the form of file on unallocated  
4 space. I testified that the files.zip folder was corrupted I  
5 was not able to tell when it was corrupted.  
6

7 The Investigating Officer closed the courtroom.  
8

9 [The Article 32 hearing recessed at 1012, 19 December  
10 2011.]  
11

12 [The Article 32 hearing was called to order at 1016, 19  
13 December 2011.]  
14

15 The Investigating Officer opened the courtroom.  
16

17 SPECIAL AGENT DAVID SHAVER, Civilian, was called as a witness  
18 for the prosecution, was sworn, and testified in substance as  
19 follows:  
20

21 DIRECT EXAMINATION  
22

23 Questions by assistant trial counsel 1:  
24

25 An IP address is an Internet protocol address. It is a  
26 unique set of numbers that is assigned to a computer so that it  
27 can talk on the network. The [dot] .40 machine was the machine  
28 that PFC Manning's user profile was on. That was his secondary  
29 computer. I verified the acquisition and verification hashes,  
30 the hashes matched. Then I scanned it with antivirus, then I  
31 conducted my examination.  
32

33 The configuration of this computer was that it was a  
34 classified computer, a Windows operating system on the Army  
35 domain. It has CD burning tools, it had Roxio that was  
36 installed on the computer. Roxio is CD burning software. Roxio  
37 was on the other computer, the [dot] .22 computer that also had  
38 PFC Manning's user profile on it. USB ports were disabled for  
39 storage, it is an Army policy. On both computers the USB ports  
40 were disabled. When you burn a disk using Roxio, the CD has to  
41 be named and it was named by date. This image is an artifact,  
42 the naming of a CD that I burned when I re-created, I turned the  
43 [dot] .22 computer into a virtual machine. A virtual machine is  
44 a bit by bit image of a computer, it converts it to a running  
45 computer within your computer which acts as a host, so it is  
46 running virtually in the memory of the host computer. I wanted  
47 to verify that a CD could be burned from this computer and so I

1 turned it into a virtual machine, logged on as a user and then I  
2 burned a disc.

3  
4 My investigative plan for the [dot] .40 computer was the  
5 same thing as the [dot] .22, to see if there were any  
6 Department of State cables, see if there were any Guantánamo Bay  
7 detainee assessments on there. I approached it the same way.  
8 In the unallocated space I located a deleted CSV file containing  
9 over 100,000 complete Department of State cables, which had been  
10 converted to Base 64 format. A CSV is a Comma Separated Value;  
11 it is just a way of transferring data from one database to  
12 another area. The utility of a CSV is a common format, and  
13 between each field there is a comma. Base 64 is just a way of  
14 encoding information, the benefit for it in this case would be  
15 to remove all of the characters, all of the grammatical  
16 characters. When something is base 64 encoded it looks like, to  
17 the untrained eye, gibberish. I found more than 100,000 full  
18 cables.

19  
20 The image is a very small portion of the recovered CSV  
21 file, and what I've done for this one is, to keep it presentable  
22 in open court; I filtered it on some of the unclassified  
23 Department of State cables. On the left, the first field would  
24 be the numbers, the person who was doing this wanted to ensure  
25 that he obtained all of them, so each one of them had a unique  
26 number. The second field is the date of when it was published,  
27 when the actual cable itself was published on the Department of  
28 State server, this is the Message Record Number, MRN. A message  
29 record number is how the Department of State labels their  
30 cables. And to the right of that is the base 64 stuff that I  
31 spoke of. There is a reverse process to decode base 64. It  
32 presents the information in plain text. And I was able to  
33 decode these cables.

34  
35 I found this deleted CSV in unallocated space, but I could  
36 not associate that with a user profile. You can decode manually  
37 one at a time, but that would be very time-consuming and prone  
38 to errors. Through scripting you can create an automated process  
39 to decode for you in a very quick manner. I did not find a  
40 script to decode it on this computer. I did not find any other  
41 data sets on the [dot] .40 computer.

42  
43 I do recognize that image, which is the warning banner for  
44 the computers, [dot] .22 and the [dot] .40 computers. When you  
45 first start the computer and try to log on, you are presented  
46 with this warning banner. The first sentence states, "You are  
47 accessing a US government (USG) information system that is



1 provided for US government authorized use only." When a user  
2 first logs on to the computers that I examined, you're first  
3 prompted with this warning screen and then you have to press  
4 okay.

5  
6 **CROSS-EXAMINATION**

7  
8 **Questions by the civilian defense counsel:**

9  
10 The CSV file that I just discussed was in unallocated  
11 space, so I cannot say that it was PFC Manning that accessed  
12 this information. I do not know whether usernames and passwords  
13 were shared at the T-SCIF on FOB Hammer. The unallocated space  
14 with the cables cannot be date and time stamped. I found this  
15 information on a classified computer; there is nothing wrong  
16 with this information being on a classified computer. I did not  
17 find any forensic evidence that this information was sent to  
18 anyone.

19  
20 [The witness was temporarily excused, duly warned, and  
21 withdrew from the courtroom.]

) ) ) ) ) ) ) )

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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 2**  
**24 May 2012**

# DCGS A

ACTIONABLE INTELLIGENCE TO THE WARFIGHTER

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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 3**

24 May 2012

**Continuation Sheet, DD Form 457, U.S. v. PFC Bradley E. Manning**

Manning's secondary SIPRNET computer,<sup>130</sup> and evidence of Department of State cables published before March 2010 were found in Unallocated Clusters on PFC Manning's personal computer, including data appearing to have a .csv file structure listing Department of State cables with numbers preceding 251,287 in a format similar to the cables found on PFC Manning's primary SIPRNET Computer.<sup>131</sup> Additionally, examination of Department of State cable message record numbers released by WikiLeaks identified 251,298 individual message record numbers; examination of PFC Manning's personal computer and his primary and secondary SIPRNET computers showed that they contained 83% of all the message record numbers released to WikiLeaks.<sup>132</sup>

This evidence, taken together, leads to a conclusion that the 251,287 files released by WikiLeaks were provided to WikiLeaks by PFC Manning.

The evidence showed that in his chats with Mr. Lamo concerning the State Department cables, PFC Manning said, "it was forwarded to WL ... and god knows what happens now ... hopefully worldwide discussion, debates, and reforms ... I want people to see the truth... regardless of who they are... because without information, you cannot make informed decisions as a public,"<sup>133</sup> which indicates that that he converted this database to his own use or the use of another in that he wanted to make this information public and thus deprive its owner, the United States, of its use or benefit. While there was evidence that PFC Manning had the authority to access diplomatic cables for his job,<sup>134</sup> he had no authorization to take this database from its owner and thus his taking it constituted stealing it.

The evidence showed that the valuation of the Net-Centric Diplomacy database was over \$4 million.<sup>135</sup>

The evidence showed that 18 U.S.C. 641 exists and that PFC Manning's conduct in stealing the database and converting it to his own use and the use of WikiLeaks was prejudicial to good order and discipline and was service discrediting.

I thus conclude that reasonable grounds exist to believe that PFC Manning committed the offense alleged in Specification 12 of Additional Charge II.

**Additional Charge II, Specification 13 (Art. 134, UCMJ; 18 U.S.C. 1030(a)(1)):**

*Law*

In order to prove this offense, the government must establish the following six elements:

<sup>130</sup> PFC Manning's Secondary SIPRNET Computer Forensic Report, Bates # 00199494-507, at 1, 12-14.

<sup>131</sup> PFC Manning's Personal Computer Forensic Report, Bates # 00124283-362, at 51-54.

<sup>132</sup> DoS Files Forensic Report, Bates # 00054320-34, at 14

<sup>133</sup> Lamo Chat, IO Ex. 19(D), at 33.

<sup>134</sup> Testimony of CPT Lim (stating he gave analysts the link through email to access diplomatic cables).

<sup>135</sup> NCD Valuation Documents, Bates # 00410556-60

**Continuation Sheet, DD Form 457, U.S. v. PFC Bradley E. Manning**

- (1) that at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, the accused knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer;
- (2) that the accused obtained information that has been determined by the United States government by Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables;
- (3) that the accused had reason to believe that the information he obtained could be used to the injury of the United States or to the advantage of any foreign nation;
- (4) that the accused willfully communicated, delivered, or transmitted the said information to a person not entitled to receive it;
- (5) that 18 U.S.C. section 1030(a)(1) exists; and
- (6) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.<sup>136</sup>

*Facts*

The evidence showed that PFC Manning's primary SIPRNET computer contained, under his user profile, a file named "files.zip" in the "bloop" folder that had over 10,000 Department of State cables in .html web page format, and that over 4,000 of these cables were classified.<sup>137</sup> A CD accessed on PFC Manning's personal computer containing files.zip was burned on 4 May 10.<sup>138</sup> The evidence showed that another document in the "bloop" folder, "backup.xlsx," was a spreadsheet with cables published in March, April, and May 2010.<sup>139</sup> The tab in this spreadsheet including cables published in March and April 2010 started with a cable with number 251,288. The evidence showed that PFC Manning's primary SIPRNET computer had a version of wget (software used to download files from a server) that was the same version found in the Department of State log files, the Intelink log files, and that was downloaded on a NIPRNET computer by a user of PFC Manning's user profile.<sup>140</sup> A user of PFC Manning's user profile on that NIPRNET computer did Google searches for WikiLeaks and wget.exe on 3 May 10 and downloaded wget to that profile. A user of PFC Manning's user profile then transferred wget from the NIPRNET to SIPRNET on 4 May 2010, under PFC Manning's user profile.<sup>141</sup>

<sup>136</sup> These elements are a tailored version of Eighth Circuit Model Jury Instruction 6.18 1030A.

<sup>137</sup> Testimony of SA Shaver; PFC Manning's Primary SIPRNET Computer Forensic Report, Bates # 00211037-110, at 31.

<sup>138</sup> Testimony of SA Shaver.

<sup>139</sup> PFC Manning's Primary SIPRNET Computer Forensic Report, Bates # 00211037-110, at 31; spreadsheet, at Bates # 00296982; Testimony of SA Shaver.

<sup>140</sup> PFC Manning's Primary SIPRNET Computer Forensic Report, Bates # 00211037-110, at 37.

<sup>141</sup> Testimony of SA Shaver.

Continuation Sheet, DD Form 457, U.S. v. PFC Bradley E. Manning

The evidence showed that on 20 August 2011, WikiLeaks released 251,287 Department of State cables in unredacted form and made them available on the Internet.<sup>142</sup> While the evidence was that WikiLeaks did not release the cables in the files.zip folder,<sup>143</sup> the forensic examination found thousands of State Department cables in unallocated space on PFC Manning's primary SIPRNET computer, ranging in classification from unclassified to secret; many were complete, but many others were not.<sup>144</sup> Additionally, the forensic examination of PFC Manning's primary SIPRNET computer revealed that a deleted and partially overwritten file named "c:\Lost File\backup\farah.zip" was originally created on 10 April 2010 and contained 582 Department of State Cables, over 250 of which were classified.<sup>145</sup> The evidence showed the Department of State cables were in .csv format, a way of moving files from one database to another, and were Base64 encoded.<sup>146</sup> Analysis of PFC Manning's secondary SIPRNET computer and his personal computer also showed many Department of State cables that had been converted to Base64 and stored in .csv format.<sup>147</sup> Specifically, approximately 113,000 complete Department of State cables converted to Base64 were found in a deleted .csv file in Unallocated Clusters on PFC Manning's secondary SIPRNET computer,<sup>148</sup> and evidence of Department of State cables published before March 2010 were found in Unallocated Clusters on PFC Manning's personal computer, including data appearing to have a .csv file structure listing Department of State cables with numbers preceding 251,287 in a format similar to the cables found on PFC Manning's primary SIPRNET Computer.<sup>149</sup> Additionally, examination of Department of State cable message record numbers released by WikiLeaks identified 251,298 individual message record numbers; examination of PFC Manning's personal computer and his primary and secondary SIPRNET computers showed that they contained 83% of all the message record numbers released to WikiLeaks.<sup>150</sup>

This evidence, taken together, leads to a conclusion that the 251,287 files released by WikiLeaks were provided to WikiLeaks by PFC Manning.

The evidence showed that in his chats with Mr. Lamo concerning the State Department cables, PFC Manning said, "it was forwarded to WL ... and god knows what happens now ... hopefully worldwide discussion, debates, and reforms ... I want people to see the truth... regardless of who they are... because without information, you cannot make informed decisions as a public,"<sup>151</sup> which indicates that that he had reason to believe that the information he obtained could be used to the injury of the United States or to the advantage of any foreign nation.

<sup>142</sup> Testimony of SA Bettencourt; Testimony of SA Shaver.

<sup>143</sup> Testimony of SA Shaver. SA Shaver also testified there was a problem with files.zip when it was created, and if a person using WinZip tried to open it, it would not open because it was a corrupted file, and one would need special tools to open the files in files.zip. Based on that testimony, it appears that WikiLeaks did not release the cables in files.zip because they could not open them.

<sup>144</sup> Testimony of SA Shaver.

<sup>145</sup> PFC Manning's Primary SIPRNET Computer Forensic Report, Bates # 00211037-110, at 34-36.

<sup>146</sup> Testimony of SA Shaver.

<sup>147</sup> PFC Manning's Primary SIPRNET Computer Forensic Report, Bates # 00211037-110, at 36.

<sup>148</sup> PFC Manning's Secondary SIPRNET Computer Forensic Report, Bates # 00199494-507, at 1, 12-14.

<sup>149</sup> PFC Manning's Personal Computer Forensic Report, Bates # 00124283-362, at 51-54.

<sup>150</sup> DoS Files Forensic Report, Bates # 00054320-34, at 14.

<sup>151</sup> Lamo Chat, IO Ex. 19(D), at 33.

**Continuation Sheet, DD Form 457, U.S. v. PFC Bradley E. Manning**

While there was evidence that PFC Manning had the authority to access diplomatic cables for his job,<sup>152</sup> the context of that evidence was that access was authorized for the analysts to do their job. The evidence also showed that before logging on to his primary and secondary SIPRNET computers, PFC Manning had to click "OK" on a warning banner, the first sentence of which read, "You are accessing a U.S. Government (USG) Information System (IS) that is provided for USG-authorized use only."<sup>153</sup> Accordingly, accessing diplomatic cables in order to provide them to a person not entitled to receive it exceeded authorized access. PFC Manning had no authorization to transfer this information to WikiLeaks, which was not entitled to receive it.

The evidence showed that these cables were properly classified and remain classified.<sup>154</sup>

The evidence showed that 18 U.S.C. 1030(a)(1) exists and that PFC Manning's conduct in providing these classified cables to WikiLeaks was prejudicial to good order and discipline and was service discrediting.

**Additional Charge II, Specification 14 (Art. 134, UCMJ; 18 U.S.C. 1030(a)(1)):**

*Law*

In order to prove this offense, the government must establish the following six elements:

- (1) that at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 18 February 2010, the accused knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer;
- (2) that the accused obtained information that has been determined by the United States government by Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: a classified United States Department of State cable titled "Reykjavik-13";
- (3) that the accused had reason to believe that the information he obtained could be used to the injury of the United States or to the advantage of any foreign nation;
- (4) that the accused willfully communicated, delivered, or transmitted the said information to a person not entitled to receive it;
- (5) that 18 U.S.C. section 1030(a)(1) exists; and
- (6) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

<sup>152</sup> Testimony of CPT Lim (stating he gave analysts the link through email to access diplomatic cables).

<sup>153</sup> Testimony of SA Shaver, IO Ex. 11(P), at 1 (Bates # 00376856).

<sup>154</sup> Classification Review, Bates # 00376903-53.



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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 4**  
**24 May 2012**

## The Washington Post

### Cables leak reveals flaws of information-sharing tool

By Joby Warrick  
Washington Post Staff Writer  
Friday, December 31, 2010; A01

Before the infamous leak, the 250,000 State Department cables acquired by anti-secrecy activists resided in a database so obscure that few diplomats had heard of it.

It had a bureaucratic name, Net-Centric Diplomacy, and served an important mission: the rapid sharing of information that could help uncover threats against the United States. But like many bureaucratic inventions, it expanded beyond what its creators had imagined. It also contained risks that no one foresaw.

Millions of people around the world now know that the State Department's secret cables became the property of WikiLeaks. But only recently have investigators understood the critical role played by Net-Centric Diplomacy, a computer initiative that became the conduit for what was perhaps the biggest heist of sensitive U.S. government documents in modern times.

Partly because of its design but also because of confusion among its users, the database became an inadvertent repository for a vast array of State Department cables, including records of the U.S. government's most sensitive discussions with foreign leaders and diplomats. Unfortunately for the

department, the system lacked features to detect the unauthorized downloading by Pentagon employees and others of massive amounts of data, according to State Department officials and information-security experts. The result was a disastrous setback for U.S. diplomatic efforts around the globe.

"This was as bad as it gets," said Patrick F. Kennedy, undersecretary of state for management, referring to the diplomatic fallout. "We had, over the course of many years, built up a huge amount of faith and trust. That's ruptured now, all over the world."

U.S. officials and security analysts describe the leak as a cautionary tale, one that underscores flaws in security for secret government data while also exposing a

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## The Washington Post

### Cables leak reveals flaws of information-sharing tool

downside to the U.S. government's enthusiastic embrace of information-sharing in the months after the Sept. 11, 2001, terrorist attacks.

Investigations into the attacks concluded that government agencies had failed to share critical information that could have helped uncover the Sept. 11 plot. Because of that lapse, Congress tasked the Office of the Director of National Intelligence with pressuring key government agencies - including the Pentagon, the Homeland Security Department and the State Department - to find ways to rapidly share information that could be relevant to possible terrorist plots and other threats.

The State Department, with its hundreds of diplomatic posts worldwide, was already making tens of thousands of classified cables available to intelligence and military officials with secret security clearances. But in 2005, the DNI and the Defense Department agreed to pay for a new State Department computer database that could allow the agency's cables to flow more easily to other users throughout the federal government.

"It was consistent with the concept of needing to share information after September 11th," said State Department spokesman P.J. Crowley. "We were asked to do it, and the Pentagon paid for it."

Net-Centric Diplomacy was launched in 2006 and tied into a giant Defense Department system known as the Secret Internet Protocol Router Network, or SIPRnet. Soon, nearly half a million government employees and contractors with security clearances could tap into the diplomatic cables from computer terminals around the globe.

The State Department's new database quickly garnered praise as a model of interagency collaboration. The database was named a finalist for an Excellence in Government award in 2006. The following year, then-Director of National Intelligence John D. Negroponte, whose agency led the push for information-sharing, congratulated State Department officials for making their secret cables "available in a timely, user-friendly way."

"The State Department's commitment shows

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## The Washington Post

### Cables leak reveals flaws of information-sharing tool

the way for other agencies," Negroponte wrote in a Jan. 29, 2007, letter to then-Secretary of State Condoleezza Rice.

The flaws did not become apparent until much later. One of biggest problems: Sensitive cables were often dumped willy-nilly into the database regardless of whether they belonged there, according to two department officials familiar with the internal procedures for data storage.

Thousands of cables and other documents pass through Foggy Bottom daily, and to ensure that they are routed properly, each is assigned a code or codes, similar to a Zip code. One such six-letter code - SIPDIS - flags a computer to route the document to the Net-Centric database, allowing it to be viewed by intelligence officers and military personnel worldwide.

In practice, embassy employees added the code word SIPDIS by rote, often without fully understanding what it meant, said one of the department officials, who spoke on the condition of anonymity because he was not authorized to discuss the subject.

"It wasn't clear what was to be shared or not shared," the official said. "So you end up with a cable in the database that contains embarrassing stuff about [German Prime Minister Angela] Merkel. Is that the kind of stuff that a war fighter really needs to see?"

A few State Department officials expressed early concerns about unauthorized access to the database, but these worries mostly involved threats to individual privacy, department officials said. In practice, agency officials relied on the end-users of the data - mostly military and intelligence personnel - to guard against abuse.

The department was not equipped to assign individual passwords or perform independent scrutiny over the hundreds of thousands of users authorized by the Pentagon to use the database, said Kennedy, the undersecretary of state.

"It is the responsibility of the receiving agency to ensure that the information is handled, stored and processed in accordance with U.S. government procedures," he said.

To prevent illegal intrusion, the State

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## The Washington Post

### Cables leak reveals flaws of information-sharing tool

Department has long maintained safeguards that make it difficult for an individual to download sensitive information onto a portable device such as a flash drive or compact disc. But Kennedy acknowledged that the department had no means of overseeing practices by other agencies using its data.

U.S. investigators suspect that Bradley Manning, an Army private stationed in the Persian Gulf, downloaded the 250,000 State Department cables to compact discs from a computer terminal in Kuwait. He then allegedly provided the files to WikiLeaks, which shared them with newspapers and posted hundreds of them online.

In the wake of the leak, State Department officials cut off outside access to Net-Centric Diplomacy pending a review. Some secret documents are still being made available to other agencies through a different network designed to handle highly classified data, Kennedy said.

Although it is perhaps small comfort, the disclosures could have been worse. In May, the Obama administration's top intelligence officer asked the State Department to expand the amount of material available to other agencies through Net-Centric Diplomacy.

In a letter to Secretary of State Hillary Rodham Clinton, then-Director of National

Intelligence Dennis C. Blair urged that the database include not only cables but also e-mails between State Department officials. Such a move would "ensure that critical information will reach the necessary readers across the government," Blair wrote.

Clinton refused.

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Appellate Exhibit 91

Enclosure 5

3 pages

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Military Judge's Seal Order

dated 20 August 2013

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of Trial

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Y.

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 6**  
**24 May 2012**

SF 86

Questionnaire For National Security Positions

SF 328

Certificate Pertaining to Foreign Interests

## **Appendix B**

### **Sample Acceptable Use Policy**

#### **B-1. Purpose**

This appendix provides a sample AUP that may be used by organizations to obtain explicit acknowledgements from individuals on their responsibilities and limitations in using ISs.

#### **B-2. Explanation of conventions in sample acceptable use policy**

Figure B-1, below, illustrates a representative AUP. In this figure, text appearing in italicized font should be replaced with the appropriate information pertinent to the specific AUP being executed. Army organizations may tailor the information in the sample AUP to meet their specific needs, as appropriate.



---

### Acceptable Use Policy

**1. Understanding.** I understand that I have the primary responsibility to safeguard the information contained in *classified network name (CNN)* and/or *unclassified network name (UNN)* from unauthorized or inadvertent modification, disclosure, destruction, denial of service, and use

**2. Access.** Access to *this/these network(s)* is for official use and authorized purposes and as set forth in DoD 5500.7-R, "Joint Ethics Regulation" or as further limited by this policy.

**3. Revocability.** Access to Army resources is a revocable privilege and is subject to content monitoring and security testing

**4. Classified information processing.** *CNN* is the primary classified IS for *(insert your organization)*. *CNN* is a US-only system and approved to process *(insert classification)* collateral information as well as *(insert additional caveats or handling instructions)*. *CNN* is not authorized to process *(insert classification or additional caveats or special handling instructions)*.

a. *CNN* provides communication to external DoD (or specify other appropriate U.S. Government) organizations using the SIPRNET. Primarily this is done via electronic mail and internet networking protocols such as web, ftp, telnet *(insert others as appropriate)*.

b. The *CNN* is authorized for SECRET or lower-level processing in accordance with accreditation package number, identification, etc.

c. The classification boundary between *CNN* and *UNN* requires vigilance and attention by all users. *CNN* is also a US-only system and not accredited for transmission of NATO material.

d. The ultimate responsibility for ensuring the protection of information lies with the user. The release of TOP SECRET information through the *CNN* is a security violation and will be investigated and handled as a security violation or as a criminal offense

**5. Unclassified Information Processing.** *UNN* is the primary unclassified automated administration tool for the *(insert your organization)*. *UNN* is a US-only system.

a. *UNN* provides unclassified communication to external DoD and other United States Government organizations. Primarily this is done via electronic mail and internet networking protocols such as web, ftp, telnet *(insert others as appropriate)*

b. *UNN* is approved to process UNCLASSIFIED, SENSITIVE information in accordance with *(insert local regulation dealing with automated information system security management program)*.

c. The *UNN* and the Internet, as viewed by the *(insert your organization)*, are synonymous. E-mail and attachments are vulnerable to interception as they traverse the SIPRNET and Internet

---

Figure B-1. Acceptable use policy

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**6. Minimum security rules and requirements.** As a *CNN* and/or *UNN* system user, the following minimum security rules and requirements apply:

- a. Personnel are not permitted access to *CNN* and *UNN* unless in complete compliance with the (insert your organization) personnel security requirement for operating in a TOP SECRET system-high environment.
- b. I have completed the user security awareness-training module. I will participate in all training programs as required (inclusive of threat identification, physical security, acceptable use policies, malicious content and logic identification, and non-standard threats such as social engineering) before receiving system access.
- c. I will generate, store, and protect passwords or pass-phrases. Passwords will consist of at least 10 characters with 2 each of uppercase and lowercase letters, numbers, and special characters. I am the only authorized user of this account. (I will not use user ID, common names, birthdays, phone numbers, military acronyms, call signs, or dictionary words as passwords or pass-phrases.)
- d. I will use only authorized hardware and software. I will not install or use any personally owned hardware, software, shareware, or public domain software.
- e. I will use virus-checking procedures before uploading or accessing information from any system, diskette, attachment, or compact disk.
- f. I will not attempt to access or process data exceeding the authorized IS classification level.
- g. I will not alter, change, configure, or use operating systems or programs, except as specifically authorized.
- h. I will not introduce executable code (such as, but not limited to, .exe, .com, .vbs, or .bat files) without authorization, nor will I write malicious code.
- i. I will safeguard and mark with the appropriate classification level all information created, copied, stored, or disseminated from the IS and will not disseminate it to anyone without a specific need to know.
- j. I will not utilize Army- or DoD-provided ISs for commercial financial gain or illegal activities.
- k. Maintenance will be performed by the System Administrator (SA) only.
- l. I will use screen locks and log off the workstation when departing the area.
- m. I will immediately report any suspicious output, files, shortcuts, or system problems to the (insert your organization) SA and/or IASO and cease all activities on the system.
- n. I will address any questions regarding policy, responsibilities, and duties to (insert your organization) SA and/or IASO.

---

Figure B-1. Acceptable use policy—Continued

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o. I understand that each IS is the property of the Army and is provided to me for official and authorized uses. I further understand that each IS is subject to monitoring for security purposes and to ensure that use is authorized. I understand that I do not have a recognized expectation of privacy in official data on the IS and may have only a limited expectation of privacy in personal data on the IS. I realize that I should not store data on the IS that I do not want others to see.

p. I understand that monitoring of (CNN) (UNN) will be conducted for various purposes and information captured during monitoring may be used for administrative or disciplinary actions or for criminal prosecution. I understand that the following activities define unacceptable uses of an Army IS:

(insert specific criteria)

- to show what is not acceptable use
- to show what is acceptable during duty/non-duty hours
- to show what is deemed proprietary or not releasable (key word or data identification)
- to show what is deemed unethical (e.g., spam, profanity, sexual content, gaming)
- to show unauthorized sites (e.g., pornography, streaming video, E-Bay)
- to show unauthorized services (e.g., peer-to-peer, distributed computing)
- to define proper email use and restrictions (e.g., mass mailing, hoaxes, autoforwarding)
- to explain expected results of policy violations (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, etc)

(Note. Activity in any criteria can lead to criminal offenses.)

q. The authority for soliciting a social security number (SSN) is EO 939. The information below will be used to identify you and may be disclosed to law enforcement authorities for investigating or prosecuting violations. Disclosure of information is voluntary, however, failure to disclose information could result in denial of access to (insert your organization) information systems.

**7. Acknowledgement.** I have read the above requirements regarding use of (insert your organization) access systems. I understand my responsibilities regarding these systems and the information contained in them

insert name here  
Directorate/Division/Branch

insert date here  
Date

insert name here  
Last Name, First MI

insert Rank/Grade and SSN here  
Rank/Grade SSN

insert name here  
Signature

insert phone number here  
Phone Number

Figure B-1. Acceptable use policy—Continued

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**GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
SPECIFICATIONS 13 AND 14  
OF CHARGE II FOR FAILURE  
TO STATE AN OFFENSE**

**Enclosure 7**  
**24 May 2012**

# SENSITIVE COMPARTMENTED INFORMATION NONDISCLOSURE STATEMENT

## PRIVACY ACT STATEMENT

**AUTHORITY:** EO 9397 November 1943 (SSN)  
**PRINCIPAL PURPOSE(S):** The information contained herein will be used to precisely identify individuals when it is necessary to certify their access to sensitive compartmented information.  
**ROUTINE USE(S):** Blanket routine uses, as published by Defense Intelligence Agency in the Federal Register  
**DISCLOSURE:** Voluntary; however, failure to provide requested information may result in delaying the processing of your certification

## SECTION A

An Agreement Between **MANNING, BRADLEY EDWARD** and the United States  
 (Printed or Typed Name)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to information or material protected within Special Access Programs hereinafter referred to in this Agreement as Sensitive Compartmented Information (SCI). I have been advised that SCI involves or derives from intelligence sources or methods and is classified or in the process of a classification determination under the standards of Executive Order 12333 or other Executive order or statute. I understand and accept that by being granted access to SCI, special confidence and trust shall be placed in me by the United States Government.

BEM

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of SCI, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and I understand these procedures. I understand that I may be required to sign subsequent agreements upon being granted access to different categories of SCI. I further understand that all my obligations under this Agreement continue to exist whether or not I am required to sign such subsequent agreements.

BEM

3. I have been advised that unauthorized disclosure, unauthorized retention, or negligent handling of SCI by me could cause irreparable injury to the United States or be used to advantage by a foreign nation. I hereby agree that I will never divulge anything marked as SCI or that I know to be SCI to anyone who is not authorized to receive it without prior written authorization from the United States Government department or agency (hereinafter "Department or Agency") that last authorized my access to SCI. I understand that it is my responsibility to consult with appropriate management authorities in the Department or Agency that last authorized my access to SCI, whether or not I am still employed by or associated with that Department or Agency or a contractor thereof, in order to ensure that I know whether information or material within my knowledge or control that I have reason to believe might be SCI, or related to or derived from SCI is considered by such Department or Agency to be SCI. I further understand that I am also obligated by law and regulation not to disclose any classified information or material to an unauthorized fashion.

BEM

4. In consideration of being granted access to SCI and of being assigned or retained in a position of special confidence and trust requiring access to SCI, I hereby agree to submit for security review by the Department or Agency that last authorized my access to such information or material, any writing or other preparation in any form, including a work of fiction that contains or purports to contain any SCI or descriptions of activities that produce or relate to SCI or that I

BEM

4. (Continued) have reason to believe are derived from SCI that I contemplate disclosing to any person not authorized to have access to SCI or that I have prepared for public disclosure. I understand and agree that my obligation to submit such preparations for review applies during the course of my access to SCI and thereafter, and I agree to make any required submissions prior to discussing the preparation with, or showing it to, anyone who is not authorized to have access to SCI. I further agree that I will not disclose the contents of such preparation to any person not authorized to have access to SCI until I have received written authorization from the Department or Agency that last authorized my access to SCI that such disclosure is permitted.

BEM

5. I understand that the purpose of the review described in paragraph 4 is to give the United States a reasonable opportunity to determine whether the preparation submitted pursuant to paragraph 4 set forth any SCI. I further understand that the Department or Agency to which I have made a submission will act upon them coordinating within the Intelligence Community when appropriate, and make a response to me within a reasonable time, not to exceed 30 working days from date of receipt.

BEM

6. I have been advised that any breach of this Agreement may result in the termination of my access to SCI and removal from a position of special confidence and trust, requiring such access as well as the termination of my employment or other relationships with any Department or Agency that provides me with access to SCI. In addition, I have been advised that any unauthorized disclosure of SCI by me may constitute violations of United States criminal laws, including the provisions of Sections "31, 793, 794, and 952, Title 18, United States Code, and of Section 783(b), Title 50, United States Code. Nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

BEM

7. I understand that the United States Government may seek any remedy available to it to enforce this Agreement, including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement. I have been advised that the action can be brought against me in any of the several appropriate United States District Courts where the United States Government may elect to file the action. Court costs and reasonable attorneys' fees incurred by the United States Government may be assessed against me if I lose such action.

BEM

8. I understand that all information to which I may obtain access by signing this Agreement is now, and will remain the property of the United States Government, and will otherwise be determined by an appropriate official or final ruling, of a

8. (Continued) court of law. Subject to such determination, I do not now, nor will I ever possess any right, interest, title or claim whatsoever to such information. I agree that I shall return all materials that may have come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government, or upon the conclusion of my employment or other relationship with the United States Government entity, providing me access to such materials. If I do not return such materials upon request, I understand this may be a violation of Section 793 Title 18, United States Code. **BEM**

9. Unless and until I am released in writing by an authorized representative of the Department or Agency that last provided me with access to SCI, I understand that all the conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to SCI and at all times thereafter. **BEM**

10. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect. This Agreement concerns SCI and does not set forth such other conditions and obligations not related to SCI as may now or hereafter pertain to my employment by or assignment or relationship with the Department or Agency. **BEM**

11. These restrictions are consistent with and do not separate conflict with or otherwise alter the employee obligations, rights or liabilities created by Executive Order 12356, Section 7211 of Title 5, United States Code (governing disclosures to Congress), Section 1034 of Title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by member of the military), Section 2207(b)(8) of Title 2, United States Code, as amended by the Whistleblower Protection Act.

11. (Continued) (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats), the Intelligence Identities Protection Act of 1982 (50 USC 421 et seq.) (governing disclosures that could expose confidential Government agents) and the statutes which protect against disclosure that may compromise the national security, including Section 541, 793, 794, 798 and 952 of Title 18, United States Code, and Section 4(b) of the Subversive Activities Act of 1950 (50 USC Section 783(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and these statutes are incorporated into this Agreement and are controlling. **BEM**

12. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available Sections 793, 794, 798 and 952 of Title 18, United States Code, and Section 783(b) of Title 50, United States Code, and Executive Order 12356, as amended, so that I may read them at this time, if I wish. **BEM**

13. I hereby assign to the United States Government all rights, title and interest, and all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement. **BEM**

14. This Agreement shall be interpreted under and in conformance with the laws of the United States. **BEM**


15. I make this Agreement without any mental reservation or purpose of evasion. **BEM**

16. TYPED OR PRINTED NAME (Last, First, Middle Initial) <b>MANNING, BRADLEY E</b>	17. GRADE/RANK/SVC <b>E3/PFC</b>	18. SOCIAL SECURITY NO. <b>445-98-9504</b>	19. BILLET NO. (Optional)
20. ORGANIZATION <b>HHC, 52 BCT 104 MHN DIV</b>	21. SIGNATURE 	22. DATE SIGNED (YYMMDD) <b>090122</b>	

FOR USE BY MILITARY AND GOVERNMENT CIVILIAN PERSONNEL

### SECTION B

The execution of this Agreement was witnessed by the undersigned, who accepted it on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

23. TYPED OR PRINTED NAME (Last, First, Middle Initial) <b>SALE, WALT</b>	24. ORGANIZATION <b>HHC 52 BCT 104 MHN DIV (CL)</b>	25. DATE SIGNED (YYMMDD) <b>090124</b>
25. SIGNATURE 		

FOR USE BY CONTRACTORS/CONSULTANTS/NON-GOVERNMENT PERSONNEL

### SECTION C

The execution of this Agreement was witnessed by the undersigned.

27. TYPED OR PRINTED NAME (Last, First, Middle Initial)	28. ORGANIZATION	29. DATE SIGNED (YYMMDD)
29. SIGNATURE		

### SECTION D

This Agreement was accepted by the undersigned on behalf of the United States Government as a prior condition of access to Sensitive Compartmented Information.

31. TYPED OR PRINTED NAME (Last, First, Middle Initial)	32. ORGANIZATION	33. DATE SIGNED (YYMMDD)
33. SIGNATURE		

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# CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

AN AGREEMENT BETWEEN

MANNING Bradley  
(Name of individual - Print or type)

AND THE UNITED STATES

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is marked or unmarked classified information including oral communications that is classified under the standards of Executive Order 12958, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security and unclassified information that meets the standards for classification and is in the process of a classification determination as provided in Sections 1.2, 1.3 and 14(e) of Executive Order 12958, or under any other Executive order or statute that requires protection for such information in the interest of national security. I understand and accept that by being granted access to classified information, Special Agent (name and title) shall be placed on file by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised that the unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause damage or irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge classified information to anyone unless: (a) I have officially verified that the recipient has been properly authorized by the United States Government to receive it, or (b) I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) responsible for the classification of the information or last granting me a security clearance that such disclosure is permitted. I understand that if I am uncertain about the classification status of information, I am required to confirm from an authorized official that the information is unclassified before I may disclose it, except to a person as provided in (a) or (b) above. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised that any breach of this Agreement may result in the termination of any security clearances I hold, removal from any position of special confidence and trust requiring such clearances, or the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised that any unauthorized disclosure of classified information by me may constitute a violation, or violations, of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, 1952 and 1924, Title 18, United States Code; the provisions of Section 783(b), Title 60, United States Code, and the provisions of the Intelligence Identity Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation of classified information not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all classified information to which I have access or may obtain access by signing this Agreement is now and will remain the property of the United States Government. I understand that I am not to use, or to allow others to use, any classified information for official or unofficial purposes, or to use, or to allow others to use, any classified information in which I have, or which may, in the future, come into my possession in that which is exempt from the release of such records, but upon termination or other relationship with the Department or Agency that last granted me a security clearance or that provided me a position of special confidence or trust, I am to return such materials upon request. I understand that this may be a violation of Section 793 and/or 1924, Title 18, United States Code, or United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information and at all times thereafter.

9. Each provision of this Agreement is severable. If any provision of this Agreement is held to be unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

Continued on reverse

NSA 7547-111-290-8420  
FORM 3-79 (Rev. 1-79)


STANDARD FORM 313 (REV. 1-79)  
7547-111-290-8420  
22 CFR 2000-EC-2956  
AND PG 4 OF 42

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13. These restrictions are consistent with and do not supersede, conflict with or otherwise alter the employee obligations, rights or liabilities created by Executive Order 12356, Section 7211 of Title 5, United States Code (governing disclosures to Congress); Section 1024 of Title 18, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); Section 2302(b)(5) of Title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Information Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that would expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security (including Sections 794, 793, 794, 792, 952 and 924 of Title 18, United States Code and Section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. Section 763(b)). The definitions, requirements, obligations, rights, sanctions and liabilities created by said Executive Order and listed statutes are incorporated into this Agreement and are controlling.

I have read this Agreement carefully and my questions, if any, have been answered. I acknowledge that the briefing officer has made available to me the Executive Order and statutes referenced in this Agreement and its implementing regulation (32 CFR Section 2003.20) so that I may read them at this time, if I so choose.

SIGNATURE  DATE 17 SEP 08 SOCIAL SECURITY NUMBER 445-77-7504  
 ORGANIZATION CONTRACT OR LICENSEE OR OTHER AGENT PROVIDE NAME ADDRESS AND A PHONE FEDERAL EMPLOYEE CODE NUMBER

Manning, Bradley, Edward  
 10100 N. River Ridge LP  
 FT. Drum, NY 13602

WITNESS		ACCEPTANCE	
THE EXECUTION OF THIS AGREEMENT WAS WITNESSED BY THE UNDERSIGNED		THE UNDERSIGNED ACCEPTED THIS AGREEMENT ON BEHALF OF THE UNITED STATES GOVERNMENT.	
SIGNATURE 	DATE 17 Sep 08	SIGNATURE	DATE
NAME AND ADDRESS (Type or print) Edward, Bradley 10100 N. River Ridge LP FT. Drum, NY 13602		NAME AND ADDRESS (Type or print) Edward, Bradley 10100 N. River Ridge LP FT. Drum, NY 13602	

#### SECURITY DEBRIEFING ACKNOWLEDGMENT

I declare that the provision of the message was, other than under 17 USC and Executive Order 6355, provided in the category of unclassified information and I do not believe that it contains information that is classified information. I am not aware of any information that is classified information that is being provided to any unauthorized person or organization that is not properly reported to the Federal Security Information, and I am not aware of any information that is being provided to any unauthorized person or organization that is not properly reported to the Federal Security Information.

SIGNATURE OF EMPLOYEE DATE  
 NAME OF WITNESS (Type or print) SIGNATURE OF WITNESS

NOTICE: The Privacy Act (5 U.S.C. 552a) requires that Federal agencies inform individuals that information is being collected from them, whether the collection is mandatory or voluntary, by what third party such information is collected, and what use will be made of the information. You are hereby advised that authority for collecting your Social Security Number Number 13602 is Executive Order 9835, as amended. Your Social Security Number will be used to identify you precisely when it is necessary to: 1) certify that you have access to the information indicated above or 2) determine that your access to the information indicated was terminated. A thorough disclosure of your Social Security Number and your failure to do so may impede the processing of your information or determination, or possibly result in the denial of you being granted access to classified information.

\* NOT APPLICABLE TO NON-GOVERNMENT PERSONNEL SIGNING THIS ACKNOWLEDGMENT

STANDARD FORM 312 DACT (REV 1-90)  
 ADOPTED 03



## UNITED STATES

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**MANNING, Bradley E., PFC**

U.S. Army, xxx-xx- [REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE REPLY TO  
GOVERNMENT RESPONSE TO  
DEFENSE MOTION TO DISMISS  
FOR FAILURE TO STATE AN  
OFFENSE: SPECIFICATIONS 13  
AND 14 OF CHARGE II**

DATED: 29 May 2012

## RELIEF SOUGHT

1. PFC Bradley E. Manning, by counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 907(b)(1)(B), requests this Court to dismiss Specifications 13 and 14 of Charge II because the Government has failed to allege that PFC Manning's alleged conduct exceeded authorized access within the meaning of 18 U.S.C. Section 1030(a)(1).

## ARGUMENT

2. At long last, the Government has clarified its theory of how PFC Manning allegedly exceeded his authorized access. The Government has specified that because PFC Manning's access to the SIPRNET computers was governed by a purpose-based limitation or restriction – namely, that he was “accessing a U.S. Government (USG) Information System (IS) that is provided for USG-authorized use only” – he “exceeded authorized access when he accessed those classified government computers for an unauthorized or expressly forbidden purpose.” Government Response to Defense Motion to Dismiss for Failure to State an Offense: Specifications 13 and 14 of Charge II [hereinafter Government Response], at 2. However, this purpose-based limitation or restriction theory of exceeds authorized access is, for the reasons articulated in the Defense Motion to Dismiss for Failure to State an Offense: Specifications 13 and 14 of Charge II [hereinafter Defense Motion],<sup>1</sup> premised on an impermissible interpretation of the phrase “exceeds authorized access,” as that term is defined in 18 U.S.C. Section 1030(e)(6). The Government's arguments to the contrary are without merit.

3. The Defense agrees that the statutory text is clear and unambiguous. However, far from supporting the Government's expansive interpretation of the term "exceeds authorized access," the clear and unambiguous statutory definition of the term supports the Defense interpretation of the phrase: a person exceeds authorized access only when he accesses a computer with authorization and obtains or alters information on the computer that he is not entitled to obtain or

<sup>1</sup> All citations to the Defense Motion are to the page number, not to the numbered paragraph.

alter. Indeed, the Government has not cited any case finding that the clear and unambiguous meaning of the phrase supports the Government's expansive interpretation.

4. To the extent this Court concludes that the language of Section 1030(e)(6) is ambiguous, the legislative history of Section 1030(e)(6) and of Section 1030 as a whole supports the Defense's interpretation of "exceeds authorized access." The Government's assertion to the contrary is incorrect.

5. Moreover, the case law interpreting the phrase "exceeds authorized access" overwhelmingly supports the limited interpretation of that phrase advocated by the Defense. The cases relied on by the Government are poorly reasoned and incorrectly decided. The Government's attempt to distinguish this case from the many cases adopting the limited interpretation is entirely meritless.

6. Additionally, the Government is incorrect that the rule of lenity is inapplicable in this case. Even assuming, as the Government asserts, that application of the rule of lenity requires a "grievous ambiguity," that standard is clearly met here.

7. Finally, the Government fundamentally miscomprehends the Defense's discussion of vagueness. The Government erroneously focuses on PFC Manning's standing to assert a void-for-vagueness challenge when no such challenge was raised by the Defense Motion. The Government's misunderstanding must not distract this Court from addressing the Defense's actual argument that, as a matter of statutory construction, the fact that the Government's interpretation would render one provision of Section 1030 unconstitutionally vague provides yet another reason why the Government's interpretation should be rejected and the Defense's interpretation should be adopted.<sup>2</sup>

#### **A. The Clear and Unambiguous Language of 18 U.S.C. Section 1030 Supports the Interpretation Advocated by the Defense**

8. In its Response, the Government asserts that "the plain language of the statutory text clearly supports the Government's theory or interpretation of 'exceeds authorized access.'" Government Response, at 3. The Government does not cite a single case for this unequivocal assertion.

9. Additionally, the Government's desperate attempt to pin its interpretation on one word in the statutory definition – "so" – is without merit. That argument received full consideration by the en banc Ninth Circuit, at both oral argument and in its written opinion in *United States v. Nosal* (*Nosal III*), 676 F.3d 854 (9th Cir. 2012) (en banc), and was squarely rejected. The principal cases upon which the Government relies, *United States v. John*, 597 F.3d 263 (5th Cir. 2010), and *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), do not provide any support for the Government's heavy reliance on "so." In short, the only case to accept the Government's reliance on that one word was the panel majority in *United States v. Nosal* (*Nosal I*), 642 F.3d

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<sup>2</sup> The Government offers no response to the Defense argument that overwhelming academic commentary supports the Defense's interpretation of the phrase "exceeds authorized access." Thus, the Government apparently does not dispute that, should this Court rule in favor of the Government on this issue, it would be ruling contrary to the established view of several computer crime scholars, including Professor Orin Kerr.

781 (9th Cir. 2011), and that decision was promptly rejected by the en banc Ninth Circuit in *Nosal III*. Moreover, the Defense's interpretation of the phrase "exceeds authorized access" does not, as the Government asserts, read the word "so" out of the statute. Rather, it is the Government's interpretation that requires the Court to rewrite the clear and unambiguous text of Section 1030(e)(6) by unjustifiably ascribing an expansive meaning to the simple word "so."

10. Finally, the Government simply ignores the Defense argument that the language of the specifications in this case further demonstrate that the language of Section 1030(e)(6) is clear and unambiguous. The Government's inability to effectively respond to this argument is yet additional evidence that the Government's argument regarding the clear and unambiguous language is meritless.

11. Therefore, this Court should determine that the clear and unambiguous language of Section 1030(e)(6) supports the Defense's proposed interpretation of the phrase "exceeds authorized access."

12. As an initial matter, the Government does not cite a single case for its assertion that the clear and unambiguous language of Section 1030(e)(6)'s definition of the phrase "exceeds authorized access" supports its interpretation. *John* and *Rodriguez*, the two cases upon which the Government principally relies, offer no such support, as neither case referred to Section 1030 as "clear" or "unambiguous." The Government's lack of citation speaks volumes about the weakness of its position. In its Motion, the Defense cited numerous cases supporting its contention that the clear and unambiguous language of Section 1030(e)(6) mandates the more limited interpretation of "exceeds authorized access:" a person exceeds authorized access only when he accesses a computer with authorization and obtains or alters information on the computer that he is not entitled to obtain or alter. See, e.g., *United States v. Zhang*, No. CR-05-00812 RMW, 2010 WL 4807098, at \*3 (N.D. Cal. Nov. 19, 2010) ("Nonetheless, a plain reading of [S]ection 1030(e)(6)'s definition . . . compels a different conclusion. An individual 'exceeds authorized access' if he or she has permission to access a portion of the computer system but uses that access to 'obtain or alter information in the computer that [he or she] is not entitled so to obtain or alter.' As the court in *Norsal* [sic] explained, 'there is simply no way to read that definition to incorporate policies governing use of information unless the word alter is interpreted to mean misappropriate.'" (citations omitted)); *United States v. Aleynikov*, 737 F. Supp. 2d 173, 192 (S.D.N.Y. 2010) ("The Government's theory that the CFAA is violated whenever an individual uses information on a computer in a manner contrary to the information owner's interest would therefore require a departure from the plain meaning of the statutory text."); *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010) ("The plain language of [Section 1030] supports a narrow reading. [Section 1030] expressly prohibits improper 'access' of computer information. It does not prohibit misuse or misappropriation."); *Shamrock Foods Co. v. Gast*, 535 F. Supp. 2d 962, 965 (D. Ariz. 2008) ("[T]he plain language of [Section] 1030(a)(2), (4), and (5)(A)(iii) target 'the unauthorized procurement or alteration of information, not its misuse or misappropriation.'"). In response, the Government asks this Court to hold that the clear and unambiguous meaning of Section 1030(e)(6) supports the expansive interpretation of the phrase, and it offers this Court no authority to support such an unwarranted step.

13. Even more troubling is the Government's "so" argument.<sup>3</sup> The Government explains that, in its view, "so" has the following meaning: "'So' means '[i]n the state or manner indicated or expressed.' According to the Government, the presence of 'so' after 'entitled' in § 1030(e)(6) makes the definition unambiguous – an individual 'exceeds authorized access' when he or she obtains or alters information that he or she is not entitled to obtain or alter *in those circumstances*." Government Response, at 4 (citation omitted) (emphasis and alteration in original).

14. This interpretation of "so" was roundly rejected by the en banc Ninth Circuit in *Nosal III*. See 676 F.3d at 857-58. In the *Nosal III* oral argument in December 2011, the government argued that the use of the word "so" was critically important in the drafting and interpretation of the statute. Indeed, the government seemed to suggest that the entire interpretation of Section 1030 hinged on this two-letter word. The judges did not appear impressed with the government's argument, and they harped on what they saw as the government's strained interpretation of the word "so." At various points early in the argument, the judges expressed their concern:

I guess I'm not sure why that [interpretation of 'so'] is necessary . . . it's possible. Why can't you read the 'so' as applying to physical restrictions?

...

But that's not necessarily the case . . . where actually you do have physical access, you can do it but you're just not allowed to go there. You're not required to do any hacking, it's simply they say you are not authorized to go into that area. Why isn't that [interpretation of 'so'] possible?

...

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<sup>3</sup> The Government's argument in this respect is essentially a cut-and-paste of the panel majority's decision in *Nosal I*:

The government contends that *Nosal*'s interpretation of "exceeds authorized access" would render superfluous the word "so" in the statutory definition. We agree. "So" in this context means "in a manner or way that is indicated or suggested." *Webster's Third New Int'l Dictionary* 2159 (Philip Babcock Gove, ed.2002). Thus, an employee exceeds authorized access under § 1030(e)(6) when the employee uses that authorized access "to obtain or alter information in the computer that the accesser is not entitled [in that manner] to obtain or alter." We decline to render meaningless a word duly enacted by Congress. See *Corley v. United States*, 556 U.S. 303, 129 S.Ct. 1558, 1566, 173 L.Ed.2d 443 (2009) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks and alteration omitted)). Because the statute refers to an accesser who is not entitled to access information in a certain manner, whether someone has exceeded authorized access must be defined by those access limitations. The plain language of the statute supports the government's interpretation."

*Nosal I*, 642 F.3d at 785-86. This argument was emphatically rejected by the overwhelming majority of the en banc Ninth Circuit in *Nosal III*. See 676 F.3d at 857-58.

But if you're not permitted . . . and you do it anyway . . . you're not allowed to go there. And if you do, you're violating . . . the restrictions in which case, you are doing it . . . I don't know why that isn't just . . . I don't know why that doesn't give effect to the word 'so' just as you would if you were accessing it with an improper motive.

...

But that's not the question. The question is not whether you could do better job of drafting, the question is whether this is a necessary meaning [of 'so'] . . . . Now the fact that it could have been better drafted . . . I go back and read some of my opinions from 20 years ago and I have a bunch of words I wished I'd left out. Every time you go back and redraft something you say, "oh god what was I thinking of." But unless it's necessary [to interpret 'so' as you suggest], then it seems to me that the answer you have to give is "That's a possible interpretation." Once we're in the world of possible interpretation, aren't we then required by the rule of lenity to adopt the one that sweeps in the least number of people?

Oral Argument at 5:29, 6:24, 7:46, 8:41, *United States v. Nosal*, 676 F.3d 854 (No. 10-10038), available at [http://www.ca9.uscourts.gov/media/view\\_video\\_subpage.php?pk\\_vid=0000006176](http://www.ca9.uscourts.gov/media/view_video_subpage.php?pk_vid=0000006176). This skepticism fermented into outright rejection in the en banc majority opinion:

The government's interpretation would transform the CFAA from an anti-hacking statute into an expansive misappropriation statute. This places a great deal of weight on a two-letter word that is essentially a conjunction. If Congress meant to expand the scope of criminal liability to everyone who uses a computer in violation of computer use restrictions – which may well include everyone who uses a computer – we would expect it to use language better suited to that purpose.

676 F.3d at 857.

15. Moreover, *John* and *Rodriguez* do not support the Government's heavy reliance on "so." For one thing, neither case gave any indication that the word "so" was critical to the holding. For another thing, at least one of these courts – the *Rodriguez* Court – mistakenly omitted the word "so" from its quotation of Section 1030(e)(6): "The Act defines the phrase 'exceeds authorized access' as 'to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled to obtain or alter.'" 628 F.3d at 1263 (quoting 18 U.S.C. § 1030(e)(6)) (mistakenly omitting word "so" between "entitled" and "to"); see 18 U.S.C. § 1030(e)(6). Thus, not only did both of the appellate cases upon which the Government principally relies not place any emphasis whatsoever on the word "so," one of those cases actually omitted this supposedly critical word from its quotation of the statutory definition. This provides further support for the conclusion that the Government's desperate reliance on "so" is untenable.

16. Of the cases cited by the Government, only the Ninth Circuit panel majority in *Nosal I* bought the Government's "so" argument. See 642 F.3d at 785-86. That decision was promptly rejected by an overwhelming majority of the en banc *Nosal III* Court. See 676 F.3d at 857. What the Government's argument in this case comes down to, then, is a plea for this Court to ignore the recent, directly on point decision of an en banc United States Court of Appeals and strike out on its own, resurrecting a meritless argument that the *Nosal III* Court has persuasively laid to rest. This Court should reject this hopeless plea.

17. Additionally, contrary to the Government's assertion, the interpretation of "exceeds authorized access" offered by the Defense does not render the word "so" superfluous. In its Response, the Government asserts that "[a]lthough the defense does not address the issue, the only conclusion that can be reached is that they consider the word 'so' to be superfluous." Government Response, at 4. Even a cursory reading of the Defense Motion reveals that this statement is flatly incorrect in both respects; the Defense did address the issue, and the Defense offered an interpretation of the phrase "exceeds authorized access" that did not render "so" superfluous. The Defense continues to assert, as it did in the Defense Motion, that "Congress could just as well have included 'so' as a connector or for emphasis." *Nosal III*, 676 F.3d at 858; see Defense Motion, at 13 (quoting this language). This interpretation of "exceeds authorized access" does not render "so" superfluous, and it has the added benefit, conspicuously absent from the Government's interpretation, of not relying on a two-letter word to "transform the CFAA from an anti-hacking statute into an expansive misappropriation statute." *Nosal III*, 676 F.3d at 857.

18. Indeed, it is the Government's interpretation of "so," not the Defense's interpretation, that requires this Court to rewrite the clear and unambiguous language of Section 1030(e)(6). By the Government's own admission, for the Government to "prevail" this Court would need to interpret Section 1030(e)(6) to read "an individual 'exceeds authorized access' when he or she obtains or alters information that he or she is not entitled to obtain or alter *in those circumstances*." Government Response, at 4 (emphasis in original). This Court should follow the wise lead of other courts and reject the request that it pick up a legislator's pen to rewrite this statute. See, e.g., *Walsh Bishop Assocs., Inc. v. O'Brien*, No. 11-2673 (DSD/AJB), 2012 WL 669069, at \*3 (D. Minn. Feb. 28, 2012) ("The language of [Section] 1030(a)(2) does not support the interpretation of Walsh Bishop. Instead, Walsh Bishop's interpretation requires the court to rewrite the statute to replace the phrase 'to use such access to obtain or alter information that the accesser is not entitled so to obtain or alter' with 'to use such information in a manner that the accesser is not entitled so to use.' But subsection (a)(2) is not based on use of information; it concerns access. Indeed, the language of subsection (a)(1) shows that Congress knows how to target the use of information when it intends to do so."). Therefore, the Government's "so" argument should be rejected.

19. In addition to the lack of case law in support of the Government's "clear and unambiguous" argument and its meritless "so" argument, the Government's contention that the clear and unambiguous language of Section 1030 supports its interpretation of the term "exceeds authorized access" is flawed for another reason: it fails to address the Defense's argument that the specifications in this case demonstrate that Section 1030's clear and unambiguous text favors the limited interpretation advocated by the Defense. In the Section 1030(a)(1) specifications, the

Government alleges, in pertinent part, that PFC Manning “knowingly *exceeded authorized access* on a Secret Internet Protocol Router Network computer, *and by means of such conduct having obtained information . . .*” Charge Sheet, Specification 13 (emphases supplied). It is clear from this specification that “exceeding authorized access” is different from, and a predicate to, “obtaining information.”

20. However, if the term “exceeded authorized access” is interpreted as the Government suggests, the charge would be redundant and nonsensical. It would allege, in pertinent part, that PFC Manning “knowingly [“accessed that computer . . . to obtain these documents,” *see* Oral Argument, Unauthenticated Transcript, 23 February 2012, pp. 71-72] on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information . . .” Charge Sheet, Specification 13 (alteration supplied). Thus read, the charge does not make sense since “exceeding authorized access” is conflated with obtaining documents for an improper purpose, which is the next part of the specification (“by means of such conduct having obtained information”). Thus, the exceeding authorized access cannot be the same as “obtain[ing] information” or the specification falls apart. This provides further evidence that the plain meaning of the statute is clear: Section 1030 asks only whether the accused had authorized access to the computer and information in question. It does not contemplate an inquiry into what an accused otherwise does with properly accessed information. The Government’s inability to effectively respond to this argument is yet additional evidence that the Government’s argument regarding the clear and unambiguous language is meritless.

21. In the end, Section 1030(a)(1) prohibits “exceeding authorized access,” not “exceeding authorized use.” The Government’s interpretation, in conflating the concepts of “access” and “use,” impermissibly attempts to punish PFC Manning for exceeding his authorized use. This cannot be done. *See Lewis-Burke Assocs. LLC v. Widder*, 725 F. Supp. 2d 187, 194 (D.D.C. 2010) (“‘Exceeds authorized access’ should not be confused with exceeds authorized use.” (internal quotations omitted)); *Bell Aerospace Servs., Inc. v. U.S. Aero Services, Inc.*, 690 F. Supp. 2d 1267, 1272 (M.D. Ala. 2010) (“‘Exceeds authorized access’ should not be confused with exceeds authorized use.”).

22. For these reasons and those stated in the Defense Motion, the clear and unambiguous language of the definition of “exceeds authorized access” supports the limited interpretation of that phrase: a person exceeds authorized access only when he accesses a computer with authorization and obtains or alters information on the computer that he is not entitled to obtain or alter.

#### **B. The Legislative History of 18 U.S.C. Section 1030 Supports the Interpretation Advocated by the Defense**

23. To the extent this Court determines that the Government’s proposed interpretation of the phrase “exceeds authorized access” is a plausible one, and thus concludes that the language of Section 1030(e)(6) is ambiguous, the legislative history of Section 1030(e)(6) and of Section 1030 as a whole supports the Defense’s interpretation of “exceeds authorized access.” The Government is incorrect that the 1986 Amendments to Section 1030 support its interpretation;



indeed, it does not cite even one case stating that the legislative history lends itself to an expansive reading of “exceeds authorized access.” By contrast, many of the cases cited by the Defense have concluded that the legislative history supports a limited interpretation of “exceeds authorized access” and have rejected the expansive interpretation advocated by the Government.

24. The Ninth Circuit in *Nosal III*, for example, explained that Congress’s replacement of the phrase “having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend” with the phrase “exceeds authorized access” supported the limited interpretation of that phrase that it adopted, and further undermined the Government’s proposed interpretation. 676 F.3d at 858 n.5. Along similar lines, the *Alyenikov* Court explained:

Notably, in 1986, Congress amended the CFAA to substitute the phrase “exceeds authorized access” for the phrase “or having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend.” See S.Rep. No. 99–432, at 9, *as reprinted in* 1986 U.S.C.C.A.N. 2479, 2486. By enacting this amendment, and providing an express definition for “exceeds authorized access,” Congress’s intent was to “eliminate coverage for authorized access that aims at ‘purposes to which such authorization does not extend,’” thereby “remov[ing] from the sweep of the statute one of the murkier grounds of liability, under which a [person’s] access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances that might be held to exceed his authorization.” *Id.* at 21, 1986 U.S.C.C.A.N. at 2494–95.

737 F. Supp. 2d at 192 n.23. Several other courts have echoed similar sentiments. See, e.g., *Walsh Bishop Assocs., Inc.*, 2012 WL 669069, at \*3 (“Further, the legislative purpose and history supports the plain meaning of the statute. Congress enacted [Section 1030] to deter ‘the criminal element from abusing computer technology in future frauds.’ H.R. Rep. No. 98–894, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3689, 3690. As originally enacted, [Section 1030] applied to a person who (1) knowingly accessed without authorization or (2) ‘having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend.’ Pub. L. No. 98–473, § 2102, 98 Stat. 2190, 2190–91 (1984). Congress amended the statute by replacing the latter means of access with the phrase ‘exceeds authorized access.’ See Pub. L. No. 99–474, § 2, 100 Stat. 1213, 1213 (1986). The stated reason for the amendment was to ‘eliminate coverage for authorized access that aims at purposes to which such authorization does not extend.’ See S. Rep. No. 99–432, at 21 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2479, 2495 (internal quotation marks omitted). As a result, Congress amended the statute to remove use as a basis for exceeding authorization.”); *Condux Int’l, Inc. v. Haugum*, No. 08–4824 ADM/JSM, 2008 WL 5244818, at \*5 (D. Minn. Dec. 15, 2008) (“Had Congress [under Section 1030] intended to target how a person makes use of information, it would have explicitly provided language to that effect.”); *Shamrock Foods*, 535 F. Supp. 2d at 966 (“[T]he legislative history confirms that [Section 1030] was intended to prohibit electronic trespassing, not the subsequent use or misuse of information.”); *Int’l Ass’n of Machinists & Aerospace Workers v. Werner-Matsuda*, 390 F. Supp. 2d 479, 499 n.12 (D. Md. 2005) (explaining the purpose of the change in legislative language).



25. Thus, the Government's interpretation of the legislative history has been soundly rejected by both appellate and trial courts, in both the civil and criminal context. It should be likewise rejected by this Court.

26. Accordingly, for these reasons and those stated in the Defense Motion, the legislative history of Section 1030 provides further support for the interpretation of "exceeds authorized access" advocated by the Defense and further undermines the interpretation advocated by the Government.

### C. Case Law Supports the Interpretation Advocated by the Defense

27. The case law interpreting the phrase "exceeds authorized access" overwhelmingly supports the limited interpretation of that phrase advanced by the Defense. The cases relied on by the Government are poorly reasoned and, not surprisingly, incorrectly decided. Moreover, the Government's vain attempt to distinguish this case from the litany of cases adopting the limited interpretation is entirely without merit. *John* and *Rodriguez*, upon which the Government places principal reliance, are emblematic of the flawed reasoning that adopts the expansive interpretation of "exceeds authorized access." Neither the *John* Court nor the *Rodriguez* Court offered any explanation – much less any plausible explanation – as to how its interpretation of "exceeds authorized access" could be squared with the plain meaning of Section 1030. As the court stated in *Aleynikov*:

[These cases] identify no statutory language that supports interpreting [Section 1030] to reach misuse or misappropriation of information that is lawfully accessed. Instead, they improperly infer that "authorization" is automatically terminated where an individual "exceed[s] the purposes for which access is 'authorized.'" But "the definition of 'exceeds authorized access' in [Section] 1030(e)(6) indicates that Congress did not intend to include such an implicit limitation in the word 'authorization.'"

737 F. Supp. 2d at 193 (emphasis supplied) (citations omitted).

28. The en banc *Nosal* Court further pointed out that the *Rodriguez* and *John* decisions were the product of the courts' failure to consider the broader implications of their holdings. The *Nosal III* Court explained that:

These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of "exceeds authorized access." They therefore failed to apply the long-standing principle that we must construe ambiguous criminal statutes narrowly so as to avoid "making criminal law in Congress's stead."

676 F.3d at 862-63 (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion)). In short, the Defense has used far more ink in criticizing *John* and *Rodriguez* than

those courts used in their “analysis” of the phrase “exceeds authorized access.” The perfunctory discussion and short-sighted reasoning employed by the *John* and *Rodriguez* Courts should leave any court highly skeptical of the Government’s expansive interpretation.

29. The only other two criminal cases identified by the Government – *United States v. Salum*, 257 F. App’x 225 (11th Cir. 2007) and *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997) – are even worse. These cases offer no analysis and simply state in conclusory fashion that the defendant exceeded his authorized access.

30. Understandably concerned with the dearth of quality case law supporting its position, the Government attempts to distinguish this case from the multiple authorities supporting the Defense’s position. The Government asserts that the cases cited by the Defense, other than *Nosal III*, “did not consider . . . explicit purpose-based restrictions or limitations on computer access.” Government Response, at 8. This argument is meritless.

31. To the extent the Government is attempting to draw a distinction between “explicit purpose-based restrictions or limitations” and implicit purpose-based restrictions or limitations – and it is not at all clear what the Government means when it says “explicit” – such a distinction finds no support in Section 1030, its legislative history, or the case law interpreting it. The expansive interpretation defines exceeding authorized access in terms of the purposes for which the computer is accessed or the purposes for which the information is obtained. Under this theory, the purpose for which the computer is accessed or the information is obtained controls whether access has been exceeded. In the typical case, a defendant uses a computer to obtain information for non-business purposes, and defendant thereby exceeds authorized access. There is no basis in law or logic for distinguishing cases where there is a contractual or other “explicit” restriction on computer use for non-business purposes from cases where there is some type of agency-based restriction on computer use for non-business purposes. In either type of case, the purpose of the user in accessing the computer or obtaining the information controls whether the user has “exceeded authorized access.”

32. In any event, the Government is simply wrong that the cases cited by the Defense do not involve explicit purpose-based restrictions. A simple examination of each of the cases “distinguished” by the Government reveals that each involved an explicit purpose-based restriction on the defendant’s use of the computer or the information. See *Walsh Bishop Assocs., Inc.*, 2012 WL 669069, at \*4 n.4 (explicit purpose-based restriction: “the [computer-use] policy defines inappropriate use as: ‘Revealing or publicizing proprietary, confidential or private information . . . Sending (upload) or receiving (download) copyrighted materials, trade secrets, proprietary information or similar materials without prior authorization . . . making unauthorized use of the intellectual property or proprietary data of ours or others.’”); *Xcedex, Inc., v. VMware, Inc.*, No. 10-3589 (PJS/JJK), 2011 WL 2600688, at \*4 (D. Minn. June 8, 2011) (explicit contractual purpose-based restriction: “According to the Amended Complaint, the 2009 Work Order ‘confirmed that Xcedex [plaintiff] would deliver authorization to access and use its X\_Factor software as a service’ but limited such access and use to ‘4,000 devices and licenses.’”); *Aleynikov*, 737 F. Supp. 2d at 175 (explicit contractual purpose-based restriction: “Goldman [the employer] also limits access to the Trading System’s source code only to Goldman employees who have reason to access that source code, such as the programmers

working on the Trading System.”); *Int’l Ass’n of Machinists & Aerospace Workers*, 390 F. Supp. 2d 479, 498 (explicit contractual purpose-based restriction: “Defendant Werner-Matsuda signed a Registration Agreement stipulating not to use the information provided through VL lodge for any purpose that would be contrary to the policies and procedures established by the [IAM] Constitution.”). The same can be said for the other cases cited in the Defense motion. In short, the purpose-based restrictions in the cases cited in the Defense Motion are no different in kind from the purpose-based restriction that the Government contends existed in this case.

33. More importantly, the Government’s confusion on this point should not draw attention away from the ultimate inquiry. Any type of purpose-based restriction, whether explicit or implicit, focuses on the defendant’s *use* of the computer or information (e.g. is the defendant using the computer or obtaining the information for non-business purposes?). Section 1030(e)(6), however, makes clear that the inquiry should be directed to the user’s *access* to that computer and information (e.g. is the user accessing information to which his authorization does not extend?). See *Lewis-Burke Assocs. LLC*, 725 F. Supp. 2d at 194 (“‘Exceeds authorized access’ should not be confused with exceeds authorized use.” (internal quotations omitted)); *Bell Aerospace Servs., Inc.*, 690 F. Supp. 2d at 1272 (“‘Exceeds authorized access’ should not be confused with exceeds authorized use.”). Therefore, any purpose-based restriction theory should be rejected as untenable.

34. Accordingly, for these reasons and those stated in the Defense Motion, the overwhelming majority of the persuasive case law on the interpretation of the phrase “exceeds authorized access” supports the interpretation advanced by the Defense: a person exceeds authorized access only when he accesses a computer with authorization and obtains or alters information on the computer that he is not entitled to obtain or alter.

#### **D. The Rule of Lenity Requires That “Exceeds Authorized Access” Be Read in Its Narrow Sense**

35. The Defense continues to maintain that the clear and unambiguous language of Section 1030 supports the limited interpretation of “exceeds authorized access.” Only if this Court determines that the Government’s expansive interpretation is plausible, and that Section 1030 is therefore ambiguous, must this Court consider the rule of lenity. If this Court does determine that Section 1030’s definition of “exceeding authorized access” is ambiguous, the rule of lenity is one of the many factors that, along with Section 1030’s legislative history, well-established principles of statutory construction, case law interpreting the phrase “exceeding authorized access” and the academic commentary on Section 1030, supports the conclusion that the Defense’s limited interpretation is more appropriate than the Government’s. The Government’s formulaic invocation of a “grievous ambiguity” standard, with no analysis of the ambiguity that would be present in this case if both the limited and expansive interpretations of “exceeding authorized access” are permissible, provides the Government with no relief. The ambiguity that results if both the Defense’s and the Government’s interpretations are plausible is surely grievous enough to warrant application of the rule of lenity.

36. At the outset, it should be noted that the Government has cited no case from a military court that applies the “grievous ambiguity” standard for the rule of lenity. *See* Government Response, at 8-9. The Defense’s research revealed no military decision even using the words “grievous” and “ambiguity,” or some variant of those terms, in the same sentence. Moreover, a careful look at Supreme Court precedent suggests that the Court does not actually use a “grievous” ambiguity standard and that the expression is only referred to in passing.<sup>4</sup> Nonetheless, even assuming, *arguendo*, that the “grievous ambiguity” standard articulated in the Government’s Response is the controlling standard for the rule of lenity, the rule of lenity should still be applied in this case if the Court determines that both interpretations of “exceeds authorized access” are plausible.

37. Under *Barber v. Thomas*, 130 S. Ct. 2499 (2010) and *Muscarello v. United States*, 524 U.S. 125 (1998), the two cases cited by the Government for the “grievous ambiguity” standard, *see* Government Response, at 8-9, a “grievous ambiguity” exists where “the Court must simply guess as to what Congress intended.” *Barber*, 130 S. Ct. at 2508-09 (internal quotations omitted); *see Muscarello*, 524 U.S. at 138-39.

38. In its Response, the Government has simply mouthed this standard and asserted, in conclusory fashion, that no grievous ambiguity exists. *See* Government Response, at 8-9. Upon closer inspection, however, it becomes clear that if this Court concludes that both interpretations of “exceeds authorized access” that have been advanced by the parties are permissible, Section 1030 does contain the requisite “grievous ambiguity.”

39. The Supreme Court’s decision in *Muscarello* provides an apt example of why this is so. In *Muscarello*, the issue was “whether the phrase ‘carries a firearm’ [used in 18 U.S.C. Section 924(c)] is limited to the carrying of firearms on the person.” 524 U.S. at 126. In resolving this issue, the Court concluded that the term “carry” had an ordinary meaning and that Congress intended for that ordinary meaning to govern the phrase “carries a firearm.” *Id.* at 127-131. This ordinary meaning supported the Government’s interpretation and undermined the defendants’ interpretation. *See id.* Additionally, the Court noted that the question had not perplexed the courts of appeals; instead, those courts were in unanimous agreement that the ordinary meaning of the term “carry” applied to Section 924(c). *Id.* at 131-32. These factors led the Court to conclude that its decision was “based on much more than a ‘guess as to what Congress intended,’ and [that] there [was] no ‘grievous ambiguity[.]’” *Id.* at 139.

40. This case, by contrast, possesses none of the factors identified by the Court in *Muscarello*. For one thing, to the extent there is a commonly understood, ordinary meaning of “exceeds authorized access” the Defense submits that it favors the limited interpretation. Certainly the Government cannot claim that its expansive interpretation, which conflates the concepts of “access” and “use,” *see* Argument, Part A, *supra*, is supported by any commonly understood, ordinary meaning of “exceeds authorized access,” if such an ordinary meaning exists. Thus,

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<sup>4</sup> In a search of Supreme Court case law, there were 7 cases that referred to “grievous ambiguity” in reference to the rule of lenity. Most of these 7 cases simply cross-referenced each other. By contrast, there were 72 Supreme Court cases that did not use the grievous ambiguity standard when applying the rule of lenity. These cases articulated the doctrine as some variation of the following: “The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). Moreover, as discussed, military courts have not adopted a “grievous ambiguity” standard.

unlike in *Muscarello*, the Government's interpretation is not supported by the ordinary meaning of the phrase under examination. Also, far from being uniform on this issue, most courts of appeals have not addressed the issue of the proper interpretation of the phrase "exceeds authorized access" under Section 1030. The few that have examined the issue have come to widely divergent results. Compare *Nosal III*, 676 F.3d at 863-64 (adopting limited interpretation), with *John*, 597 F.3d 263 (adopting expansive interpretation), and *Rodriguez*, 628 F.3d 1258 (same); see also *Ajuba Intern., L.L.C. v. Saharia*, No. 11-12936, 2012 WL 1672713, at \*10 (E.D. Mich. May 14, 2012) ("The parties' dispute reflects a nationwide split of authority concerning the proper interpretation of the terms 'without authorization' and 'exceeds authorized access.'). Therefore, if both the expansive interpretation and the limited interpretation of "exceeds authorized access" are permissible then, with a circuit split and no ordinary meaning supporting the Government's interpretation, courts are left to simply venture a guess as to what Congress intended the phrase to mean. Thus, the requisite "grievous ambiguity" exists.

41. Moreover, the difference between the conduct that is punishable under the two interpretations of "exceeding authorized access" is hardly academic. As discussed elsewhere, see Defense Motion, at 21-24; see also Argument Part E, *infra*, a staggering amount of conduct is punishable under the expansive interpretation that would not be punishable under the limited interpretation. This wide gulf between the conduct that is punishable under the varying interpretations is even further evidence of the "grievous ambiguity" that exists.

42. Indeed, this was precisely the concern that led the *Nosal III* Court to rely, at least in part, on the rule of lenity in reaching its conclusion. The *Nosal III* Court explained that, given the wide range of conduct made punishable under the Government's interpretation of "exceeds authorized access," the rule of lenity should be invoked:

In *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), the Supreme Court refused to adopt the government's broad interpretation of a statute because it would "criminalize a broad range of day-to-day activity." *Id.* at 949, 108 S.Ct. 2751. Applying the rule of lenity, the Court warned that the broader statutory interpretation would "delegate to prosecutors and juries the inherently legislative task of determining what type of . . . activities are so morally reprehensible that they should be punished as crimes" and would "subject individuals to the risk of arbitrary or discriminatory prosecution and conviction." *Id.* By giving that much power to prosecutors, we're inviting discriminatory and arbitrary enforcement.

We remain unpersuaded by the decisions of our sister circuits that interpret the CFAA broadly to cover violations of corporate computer use restrictions or violations of a duty of loyalty. See *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir.2010); *United States v. John*, 597 F.3d 263 (5th Cir.2010); *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418 (7th Cir.2006). These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of "exceeds authorized access." They therefore failed to apply the long-standing principle that we must construe ambiguous criminal statutes narrowly so as to

avoid “making criminal law in Congress’s stead.” *United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008).

676 F.3d at 862-63.

43. Therefore, for these reasons and those articulated in the Defense Motion, this Court should, if it determines that Section 1030(e)(6) is ambiguous, apply the rule of lenity and adopt the limited interpretation of “exceeds authorized access” advocated by the Defense.

#### **E. The Government Profoundly Misunderstands the Defense’s Vagueness Discussion**

44. Of all the meritless arguments made in the Government’s Response, the most glaring is the Government’s response to the Defense’s vagueness discussion. Whether it honestly misunderstood the Defense’s argument or attempted to use its void-for-vagueness response as a red herring, the Government mistakenly focuses on PFC Manning’s standing to make a void-for-vagueness claim. In so doing, the Government offers no response to the Defense’s real argument concerning the vagueness of one provision of Section 1030: because the interpretation of “exceeds authorized access” chosen by a court applies to *all* provisions of Section 1030 in which that phrase is used and because the Government’s expansive interpretation would render one of those provisions unconstitutionally vague, *as a matter of statutory construction*, this Court must adopt the narrower interpretation to save Section 1030’s constitutionality.

45. In the event that the Defense Motion was at all unclear on this point, the Defense now reiterates that the vagueness section of its Motion, *see* Defense Motion, at 21-24, was *not* making a void-for-vagueness challenge to Section 1030(a)(1), or any other subsection of Section 1030, on PFC Manning’s behalf. Rather, the Defense was merely illustrating the vagueness problems that the Government’s interpretation would pose for one provision of Section 1030. And since the interpretation of “exceeds authorized access” chosen by a court in *any* Section 1030 prosecution must apply to *all* provisions of Section 1030 using that phrase, the Court must, as a matter of statutory construction, consider the vagueness issues the Government’s interpretation poses in selecting the proper interpretation of the phrase. When the Defense’s argument is viewed in this appropriate light, the Government’s discussion of which provisions of Section 1030 PFC Manning does and does not have standing to challenge on vagueness grounds is nonresponsive to the Defense’s argument and entirely beside the point.

46. In the course of discussing PFC Manning’s standing to raise a vagueness challenge, the Government asserts the following: “An interpretation of a phrase under § 1030(a)(1) that may lead to absurd results under another provision of § 1030 is irrelevant to the issues before this Court.” Government Response, at 9. This statement could not be further from the truth.

47. It is a bedrock principle of statutory construction that “identical words and phrases within the same statute should normally be given the same meaning.” *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007); *see Nosal III*, 676 F.3d at 859 (quoting this language). This principle makes manifest that the interpretation given to “exceeds authorized access” under any provision of Section 1030 must also be given to all other provisions of Section 1030 where

this phrase appears. See *Nosal III*, 676 F.3d at 859. Additionally, the Government has helpfully cited *Corley v. United States*, 556 U.S. 303 (2009), a case which supports the Defense's position. In *Corley*, the Court discussed "one of the most basic interpretative canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" 556 U.S. at 314 (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (emphasis supplied). In *Corley*, the Court found that "[t]he fundamental problem with the Government's reading of [the subsection at issue] is that it renders [another subsection] nonsensical and superfluous." *Id.* at 314. Thus, *Corley* recognizes that an interpretation of a certain provision of a statute must be reconciled with what that interpretation would mean for another section of that same statute.

48. Taken together, the principles of statutory construction identified in *Powerex Corp.* and *Corley* readily demonstrate why the Government's above-quoted assertion that is utterly baseless and flatly incorrect: where, as here, a statute uses identical words and phrases within a statute (such that those identical words and phrases must be given the same meaning), a court may not construe a provision in that statute in a way that renders any provision of it void. See *Corley*, 556 U.S. at 314; *Powerex Corp.*, 551 U.S. at 232. The Government's suggestion that "[a]n interpretation of a phrase under § 1030(a)(1) that may lead to absurd results under another provision of § 1030 is irrelevant to the issues before this Court[.]" Government Response, at 9, completely ignores these fundamental principles.

49. Remarkably, the Government's statement perfectly mirrors the discredited argument of the government in *Nosal III*:

The government argues that our ruling today would construe "exceeds authorized access" only in subsection 1030(a)(4), and we could give the phrase a narrower meaning when we construe other subsections. This is just not so: Once we define the phrase for the purpose of subsection 1030(a)(4), that definition must apply equally to the rest of the statute pursuant to the "standard principle of statutory construction . . . that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007). The phrase appears five times in the first seven subsections of the statute, including subsection 1030(a)(2)(C). See 18 U.S.C. § 1030(a)(1), (2), (4) and (7). Giving a different interpretation to each is impossible because Congress provided a *single* definition of "exceeds authorized access" for all iterations of the statutory phrase. See *id.* § 1030(e)(6). Congress obviously meant "exceeds authorized access" to have the same meaning throughout [S]ection 1030. We must therefore consider how the interpretation we adopt will operate wherever in that section the phrase appears.

676 F.3d at 859 (emphasis in original). This point was also clearly stated in the Defense Motion. See Defense Motion, at 22-23 n.12.

50. At bottom, the Government is, through a misplaced focus on PFC Manning's standing to raise a *vagueness challenge*, inviting this Court to ignore well-established principles of *statutory*



construction in determining which interpretation of the phrase “exceeds authorized access” to adopt. This Court should, based on the principles of *Corley* and *Powerex Corp.* and for the reasons stated in *Nosal III*, decline that invitation.

51. Therefore, the fact that a particular interpretation of “exceeds authorized access” could render another provision of Section 1030 unconstitutionally vague is indeed relevant to this Court’s inquiry into the proper interpretation of that phrase. In the Defense Motion, the Defense identified several reasons why the expansive interpretation of “exceeds authorized access” would render Section 1030(a)(2)(C) unconstitutionally vague. The Government has offered no rebuttal to this argument; it instead focused on what it erroneously perceived as an obstacle to the Court’s consideration of the arguments (i.e. PFC Manning’s standing to raise a vagueness challenge). The Defense will therefore not repeat the many unopposed arguments as to why the expansive interpretation of “exceeds authorized access” renders Section 1030(a)(2)(C) unconstitutionally vague.

52. However, now that the Government has finally specified its theory of “exceeds authorized access” – namely, that the warning banner on a Government computer stating that the computer is to be used for Government-authorized use only constitutes an explicit purpose-based restriction on access, *see* Government Response, at 1-2 – a brief comment on the vagueness concerns for users of Government computers is warranted. This theory clearly implicates the constitutional vagueness concerns specified in the Defense Motion. Warning banners like the one referenced by the Government in its Response, *see id.*, are commonplace for Government computers. If a Soldier lawfully accesses a Government computer displaying a warning banner of this type, but then checks his or her personal email, or sports scores, or any of the other countless trivial things people do on their computers in a day’s work, the Soldier will have committed a federal offense under Section 1030(a)(2)(C) if the Government’s interpretation is accepted. How can a Soldier be expected to know that his occasional innocent use of his computer for some trivial personal purpose could lead to his court-martial? Indeed, the void-for-vagueness doctrine was meant to prohibit enforcement of offenses with such serious notice deficiencies. Moreover, any assertion that the prosecuting authorities would never charge a Soldier for such minor misconduct cannot cure the constitutional violation. *See United States v. Stevens*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1577, 1591 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

53. Therefore, because the Government’s interpretation of “exceeds authorized access” renders Section 1030(a)(2)(C) unconstitutionally vague, it cannot be adopted by this Court for any provision of Section 1030. *See Corley*, 556 U.S. at 314; *Powerex Corp.*, 551 U.S. at 232; *Nosal III*, 676 F.3d at 859. Accordingly, sound principles of statutory construction require that this Court adopt the Defense’s interpretation of this phrase.

#### CONCLUSION

54. For the reasons articulated above and in the Defense Motion, the Defense requests this Court



to dismiss Specifications 13 and 14 of Charge II because the Government has failed to allege that PFC Manning's alleged conduct exceeded authorized access.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Coombs', with a stylized flourish at the end.

DAVID EDWARD COOMBS  
Civilian Defense Counsel

## UNITED STATES

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**MANNING, Bradley E., PFC**

U.S. Army, XXX-XX-[REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

### DEFENSE MOTION TO COMPEL IDENTIFICATION OF BRADY MATERIALS

DATED: 10 May 2012

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 701(a)(6), respectfully requests that the Government be compelled to identify *Brady* material when providing discovery to the Defense.

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2).

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

4. To date the Government has provided the Defense with twelve (12) pages of *Brady* material taken from an assessment/investigation/working document review by the Office of the National Counterintelligence executive (ONCIX), Office of the Director of National Intelligence (ODNI), and the Information Review Task Force (IRTF) of the Defense Intelligence Agency (DIA). *See* Attachment to Appellate Exhibit XXXI.

5. Additionally, the Government has provided the Defense with 458 files, totaling 6,905 pages, from the Federal Bureau of Investigation ("FBI"), which, "at a minimum", contains *Brady* material.

### WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the following evidence in support of the Defense's motion:

- a. Charge Sheet.
- b. Government assertions during various R.C.M. 802 sessions.

### LEGAL AUTHORITY AND ARGUMENT

7. The Defense submits that the Government's obligations under R.C.M. 701(a)(6) and *U.S. v. Brady*, 373 U.S. 83 (1963), should require it to provide applicable disclosures to the Defense independent of other disclosures. That is, this Honorable Court should require the Government to separate or identify *Brady* material due the circumstances of PFC Manning's case.

8. R.C.M. 701(a)(6) and *Brady* require that the Government disclose to the Defense all evidence that reasonably tends to negate guilt, reduce the degree of guilt or reduce an accused's punishment. *See also* AR 27-26, para. 3.8(d). While the rules and case law do not specifically require the Government to *identify* what material is *Brady*, it is clear that, under certain circumstances such a requirement would be warranted. *U.S. v. Skilling*, 554 F.3d 529 (C.A. 5th Cir., 2009). Indeed, it is well within this court's discretion to order such. *U.S. v. Salyer*, 2010 WL 3036444 (E.D.Cal.). Case law supports the Defense's position that, given the circumstances, specific identification of *Brady* material is warranted in PFC Manning's case.

9. *U.S. v. Hsia*, 24 F.Supp.2d 14 (D.D.C. 1998) is instructive on how the Government should go about fulfilling their obligation under *Brady* when there is voluminous discovery. There, the accused was provided with access to 600,000 documents. The court held, "[t]he government cannot meet its *Brady* obligations by providing Ms. Hsia with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack. To the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to Ms. Hsia." *Id.* at 29-30. *See also, U.S. v. Rubin*, -- F.Supp.2d--, 2011 WL 5448066 (S.D.N.Y. 2011).

10. The court's ruling in *U.S. v. Salyer* also provides guidance. *Salyer* involved a case with millions of pages of discovery. The prosecution argued that its discovery obligations were satisfied by simply disclosing the voluminous documents to the Defense and pointed to several cases supporting their position that the Government has no duty to *identify Brady* material. While acknowledging the cases cited by the Government, the court rejected the Government

position and held that Government did have an obligation to both *disclose and identify* *Brady* material under the circumstances facing *Salyer*. The court was particularly persuaded by the sheer volume of discovery, the relatively small size of the Defense team, the accused's pre-trial confinement, the lack of parallel civil litigation with overlapping evidence and the lack of corporate assistance to sift through volumes of discovery. *Id.* at 7. *See also, U.S. v. W.R. Grace*, 401 F.Supp.2d 1060, 1080 (D.Mont 2005).

11. The factors set forth by the *Salyer* court were later adopted by the court in *U.S. v. Rubin*, *supra*. *Rubin* involved allegations of conspiracy to illegally rig bids, fix prices and manipulate the market investment instruments. *Id.* at 1. There were a total of 210 transactions that allegedly substantiated the alleged crimes and the discovery was voluminous. *Id.* While holding that the prosecution did not need to specifically identify *Brady* material, the court nonetheless weighed the factors considered by the *Salyer* court. In addition to noting that the discovery provided to the Defense was searchable, the court was also persuaded that the Defense had corporate assistance in the defense, there was "ongoing parallel civil litigation with overlapping documents and evidence" and there were multiple defendants with "overlapping discovery needs", the accused was not in pre-trial confinement, and there was not a small Defense team. *Id.* at 4. Clearly, the *Rubin* court adopted the factors set forth in *Salyer* in determining whether an exception to the general rule was warranted.

12. The circumstances of PFC Manning's case warrant a requirement that the Government specifically identify *Brady* material. Indeed, each of the factors discussed by the *Salyer* and *Rubin* courts weigh in favor of such a requirement.

a. PFC Manning has been in pre-trial confinement for nearly two years and has been denied the opportunity to participate in his defense in a truly meaningful way. PFC Manning has no opportunity to review much of the discovery in this case because the Joint Regional Confinement Facility ("JRCF") lacks the SCIF requisite for such review. Indeed, the discovery in question is only available in Rhode Island and Maryland, both thousands of miles from PFC Manning's location in Kansas.

b. The discovery provided by the Government is not text searchable. Moreover, the documents are not readily available to the Defense, as no member of the Defense team has easy access to the documents. Mr. Coombs is required to drive over 30 miles to gain access to the material in question, while CPT Tooman can currently only access the material by going TDY for several days at a cost of thousands of taxpayer dollars.

c. There are not multiple defendants, nor is there parallel civil litigation with overlapping discovery needs.

d. As a Soldier in the U.S. Army, PFC Manning has no corporate assistance with his defense.

e. The Defense team is relatively small compared to the Government. The Government has at least four (4) Officers working full time, one (1) Officer working part time, two (2) legal administrators and an unknown amount of paralegal support. By contrast, the Defense consists solely of Mr. Coombs, CPT Tooman, a legal administrator (who is currently in the process of

completing a PCS move) and the newly detailed counsel, MAJ Tom Hurley. Whereas the Government attorneys are geographically located in one place, the Defense is spread throughout the country with varying levels of access to evidence and PFC Manning.

f. The discovery in this case is already voluminous and, presumably, there is more to come.

13. There is incentive to rule in favor of the Defense so as to prevent the Government from burying *Brady* material in mountains of voluminous discovery. The courts in *Hsia* and *Salzer* each warned of the possibility of such a practice. At issue presently are nearly 7,000 pages of discovery, but there are, no doubt, tens of thousands of pages looming on the horizon. Ruling against the Defense on this motion creates the incentive for the Government to bury *Brady* material and force the Defense to sift through stacks of paperwork in order to prepare a competent defense – all while the Government has actual knowledge of *Brady* material. This is not in accordance with the spirit of *Brady*.

14. The Government has already set a precedent for itself when disclosing *Brady* material. Until the FBI documents, the Government had been providing *Brady* materials separately. When the Government specifically identifies *Brady* material in some instances (like the Government's first 12 page disclosure) and fails to do so in others (like the FBI documents), the implication is that no *Brady* material is present when the documents aren't identified as such.

15. The Government has made clear that they are already identifying *Brady* material as part of their due diligence requirement. It would not be overly arduous for the Government to specifically identify *Brady* material for the Defense when they are already doing it for themselves. It would be quite easy for the Government to simply identify *Brady* material before turning documents over to the Defense.<sup>1</sup> Any resistance to such a request would only suggest that either:

a) The Government is not actually specifically identifying *Brady* material, or

b) That the Government wishes to place a burden on the Defense so as to gain a tactical advantage.

16. The circumstances of PFC Manning's case warrant requiring the Government to identify *Brady* material. PFC Manning is a lone accused in pre-trial confinement, he has a relatively small Defense team, there is no concurrent civil litigation and much of the voluminous discovery is either not searchable or not easily accessed by the Defense. The burden of this requirement on the Government will be minimal and, perhaps most importantly, will ensure that the Government does not bury *Brady* material within its discovery disclosures.

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<sup>1</sup> Indeed, when the Government expressed concern about the difficulty of comparing original and redacted motions, the Defense voluntarily adopted a system that would make it easier for the Government to meaningfully compare the documents.

CONCLUSION

17. For the foregoing reasons, the Defense requests this Court require the Government to specifically identify all *Brady* material when providing discovery to the Defense.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', with a long horizontal flourish extending to the right.

JOSHUA J. TOOMAN  
CPT, JA  
Defense Counsel

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

Prosecution Response

to Defense Motion to Compel  
Identification of Brady Materials

24 May 2012

### RELIEF SOUGHT

The prosecution requests that the Court deny the Defense Motion to Compel Identification of Brady Materials (Defense Motion) because the rules of discovery do not support the defense's request for the prosecution to separate or identify material under *Brady v. Maryland*, 373 U.S. 83 (1963) or Rule for Courts-Martial (RCM) 701(a)(6).

### BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. *See Manual for Courts-Martial, United States*, R.C.M. 905(c) (2008).

### FACTS

1. The United States stipulates to those facts cited in Defense Motion ¶ 3.
2. The accused recently relieved two attorneys and removed them from the defense team. *See* 24 Apr. 2012 Article 39a hearing.
3. There are three safes available to the defense. A safe assigned to the Trial Defense Service (TDS) Office on Ft. Myer in Building 229, Joint Base Myer-Henderson Hall, VA, has been available since 12 Oct. 2010. A safe assigned to the TDS Office on Ft. Leavenworth in Building 244, Ft. Leavenworth, KS, has been available since 22 June 2011. A safe assigned to the TDS Office on Ft. George G. Meade has been available since 10 Aug. 2011. *See* Appellate Exhibit V, Enclosure 7.
4. The United States established a remote office in a government facility, including a printer, at the Naval War College for Mr. Coombs to enable him to review classified information. *See* Enclosure 2.

## WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this response. The United States respectfully requests that the Court consider Appellate Exhibit V, Prosecution Motion for Protective Order, 21 Feb. 2012, and its enclosures. The United States also requests the Court consider the enclosures listed at the bottom of this motion.

## LEGAL AUTHORITY AND ARGUMENT

The Court should not Order the United States to separate and identify specific *Brady* material because the United States is not obligated to prepare the defense's case. The United States has not operated in bad faith and has worked to provide *Brady* materials as soon as practicable pursuant to RCM 701(a)(6).

### **I. THE UNITED STATES IS NOT REQUIRED TO SEPARATE *BRADY* MATERIAL**

RCM 701(a)(6) requires a trial counsel, "as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) [n]egate the guilt of the accused of an offense charged; (B) [r]educe the degree of guilt of the accused of an offense charged; or (C) [r]educe the punishment." RCM 701(a)(6) is the military's *Brady* rule. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). As a general rule, the United States is under no duty to direct an accused to *Brady* material within a larger mass of disclosed evidence. *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009) *vacated in part on other grounds*, 130 U.S. 2896 (2010) (citing *United States v. Mulderig*, 120 F.3d 534, 541 (5th Cir. 1997); *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997)); *United States v. Warshak*, 631 F.3d 266, 297 (6th Cir. 2010) (citing *Skilling*, 554 F.3d at 576). Additionally, the Seventh Circuit upheld the proposition that the United States is under no duty to direct the defense to exculpatory evidence within a large mass of undisclosed evidence. See *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011) (quoting *Skilling*, 554 F.3d at 576). The Eleventh Circuit has also rejected the claim that the United States must identify specific *Brady* material amidst voluminous material because the defense could request a continuance or advise the United States of a defense theory to help the United States provide relevant discovery materials. See *United States v. Jordan*, 316 F.3d 1215, 1253-54 (11th Cir. 2003). Accordingly, the United States does not violate its *Brady* obligations by providing large quantities of discovery. *Warshak*, 631 F.3d at 274.

*Brady* "does not place any burden upon the Government to conduct a defendant's investigation." *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990). When evidence is equally available to the defense and prosecution, the accused must investigate and bears responsibility for failing to conduct the investigation diligently. See *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). "If the rule were otherwise, it would place '[the United States]' in the untenable position of having to prepare both sides of the case at once.'" *United States v. Rubin/Chambers, Dunhill Insurance Services*, 825 F. Supp.2d 451, 454 (S.D.N.Y. 2001) (quoting *United States v. Ohle*, 2011 WL 651849 at \*4 (S.D.N.Y. 7 Feb. 2011)). Finally, "*Brady* does not mean that the government must take the evidence it has already disclosed to [the



defense], sift through this evidence, and organize it for [the defense's] convenience." *United States v. Dunning*, 2009 WL 3815739 at \*1 (D. Ariz. 12 Nov. 2009).

The United States may satisfy its *Brady* obligations through disclosures of exculpatory or impeachment material within large productions of documents or files. See *Warshak*, 631 F.3d at 297 (describing as "empty" the argument that the government failed to fulfill its *Brady* obligations by handing over millions of pages of evidence to defense to find exculpatory information); cf. *Strickler v. Greene*, 527 U.S. 263, 283 n. 23 (1999) (noting that an open file policy may increase the efficiency and fairness of the criminal process). Simply advising the defense of the availability of 10,000 pages of documents satisfies *Brady*. See *United States v. Serfling*, 504 F.3d 672, 678 (determining that notifying the defendant of the existence of documents and making them available for inspection is not a suppression for *Brady* purposes where defendant chose not to inspect them).<sup>1</sup> The United States has endeavored to disclose all evidence and information contained within the prosecution's files and those files which the prosecution must search, including *Brady* material, as soon as it has been able given the need for classification reviews and approvals. Additionally, the United States has disclosed more broadly than *Brady* requires. *Brady* materials have been and will continue to be provided to the defense, which exceeds disclosing the mere existence of the materials or making them available for disclosure; the provision of materials satisfies the United States' obligations under *Brady*.

The defense contends that the Court should prevent the United States from burying the defense in voluminous discovery. In response, the United States provides *Brady* material as soon as practicable. The United States turns over information after receiving the requisite approvals for unclassified and classified materials. Although the defense claims that nearly 7,000 pages are at issue<sup>2</sup>, the defense neglects the fact that many of these pages contain redactions, are blank, or little information; therefore, inspecting the pages to examine the information is easier than sifting through millions of pages to find certain material. Moreover, the page count presented by the defense represents a fraction of the page counts discussed in cases the defense cites. Compare *United States v. Salyer*, 2010 WL 3036444 (E.D. Cal. Aug. 2, 2010) (involving millions of pages); *United States v. Hsia*, (involving 600,000 documents and not pages).

Finally, the United States disputes that it has separated and identified *Brady* material previously or that the United States has a duty to do so. Instead, the United States has provided *Brady* materials to the defense in a timely manner to expedite the defense's ability to do its due diligence.<sup>3</sup> The United States is under no obligation to sift through the provided evidence and organize it for the defense's convenience.<sup>4</sup>

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<sup>1</sup> The United States notes that these cases focus on merely providing the defense the opportunity to inspect documents within the possession of the government according to applicable rules. RCM 701 only requires inspection of such documents, yet the defense requests the Court order the United States to identify *Brady* material specifically that is contained within the produced documents the defense currently possesses.

<sup>2</sup> The United States does not stipulate that 7,000 pages are at issue; instead, the United States responds to the defense claim.

<sup>3</sup> The defense confuses the notice the prosecution provides in emails focused on discovery as identification of *Brady* material. See Enclosure 3, Enclosure 4, Enclosure 5. Each time the United States sends or delivers a discovery production, it sends an email similar to these enclosures and provides a brief explanation of the material.

## II. GOOD FAITH TEST IN *SKILLING* IS THE CORRECT TEST, NOT *SALYER*

Assuming, *arguendo*, the Court determines that discovery in this case necessitates specific identification of *Brady* material, *Skilling* presents the correct test, not *Salyer*. *Skilling* is a published Fifth Circuit Court of Appeals decision. Additionally, the Sixth Circuit has adopted the *Skilling* test in *Warshak*. *Warshak*, 631 F.3d at 297-298 (discussing and applying *Skilling* factors). Contrastingly, *Salyer* is a district court slip opinion involving business records pertaining to racketeering. *Salyer* also suggests that its application should be limited. See *Salyer* at \*8 ("The [magistrate judge] does not find, nor would he, that the identification requirements of this case would apply to other cases not similarly situated in factual circumstances."). In *Salyer*, the magistrate judge also noted that the prosecution sought voluminous material because, in essence, it could. *Salyer* at \*3 n. 4 (noting that grand jury subpoenas are deliberately worded broadly). Here, the broad consequences of the alleged acts of the accused have determined the scope of discovery. Cf. *United States v. Qadri*, 2010 WL 933752 at \*5 (D. Haw. Mar. 9, 2010) (considering the complex nature of the alleged crimes and necessity of coordinating branches of government in the investigation as factors for determining whether delays were undue).

*Skilling* describes three factors that might lead a court to conclude that the United States must identify *Brady* material: 1) padding an open file with voluminous information, 2) creating a voluminous file that is unduly onerous to access, and 3) operating in bad faith in performing its *Brady* obligations. See *Skilling*, 554 F.3d at 577. The United States has not padded discovery or acted in bad faith, nor has the defense provided any evidence of padding or specific bad faith.

Additionally, the United States has not created a voluminous file that is unduly onerous to access. The defense has received discovery in electronic format in individual "PDF" files. Similarly, the defense further protests that materials are not readily accessible, but the United States has provided multiple safes, in four different geographic locations for storing and accessing classified information where legally permitted. See Appellate Exhibit V, Enclosure 7; see also Enclosure 1. Also, the defense does not require a SCIF because neither the information being produced, none of the material subject to this motion, nor the material produced in discovery, thus far, is sensitive compartmented information (SCI). All TDS offices have been approved to hold and use classified material so long as the material is stored properly within the safe, including the office located at Fort Leavenworth, Kansas where the accused is located for pretrial confinement.

In the past year, the United States has equipped three TDS offices, and provided three safes, three classified laptops, a separate classified office at the Naval War College with a printer, courier cards, and personnel. See Appellate Exhibit V p. 2; Appellate Exhibit V, Enclosures 5, 8; Enclosure 2. The United States stands ready to consider future requests by the defense as they are made; however, the defense must first make those requests. Ultimately, the

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<sup>4</sup> The United States rejects the defense's assertions that it would not be overly arduous to identify *Brady* material for the government. Separating and identifying the *Brady* information would require preparing both sides of this case and would slow discovery, especially considering at this point in litigation the United States has produced approximately 44,835 documents totaling 447,745 pages. If the Court is inclined to order the United States to identify *Brady* material, then the prosecution would have to re-review these documents for identification purposes.

United States has operated in good faith in delivering *Brady* materials via common means, which do not create an unduly onerous burden on the defense.

### III. APPLICATION OF *SALYER* FACTORS SUPPORTS NOT REQUIRING SEPARATION AND SPECIFIC IDENTIFICATION OF *BRADY* MATERIALS

Assuming, *arguendo*, that *Salyer* describes the proper standard, the facts do not support requiring the United States to separate and identify *Brady* material. First, as noted above, the United States provides *Brady* materials as soon as practicable to maximize the time during which the defense may exercise its due diligence. Second, the defense describes its team as small, but the defense recently relieved two of its members, and has not asked for additional support from the command nor TDS. Third, the accused has received considerable resources from the United States to put forth his defense. See, e.g., Appellate Exhibit V, Enclosures 5, 6, 7, and 8. Finally, since the accused moved to Fort Leavenworth, Kansas, the United States taken steps to ensure that the accused may participate in his defense and communicate with the members of his defense team. The United States has offered to fund all military defense counsel and government team members, including experts, to fly anytime to visit their client. The accused has been granted limited access to classified material to assist in the preparation of his defense. Furthermore, classified material can be delivered to Fort Leavenworth to aid in coordination of the defense, but the defense has chosen not to move the information themselves with courier cards, nor requested the Government's assistance. Therefore, discovery is not overly onerous for the defense.

### CONCLUSION

For the foregoing reasons, the United States requests the Court to Deny Defense Motion to Compel Identification of *Brady* Material.



ALEXANDER S. VON ELTEN  
CPT, JA  
Assistant Trial Counsel



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 24 May 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

5 Enclosures

1. David Coombs, Re: Classified Information, 19 Apr 12 Email
2. MAJ Fein, Re: Outstanding Issues, 23 Apr 12 Email
3. MAJ Fein, US v. PFC BM (Discovery Update), 1 Sep 11 Email
4. MAJ Fein, US v. PFC BM (Art 32 Report & Discovery), 13 Jan 12 Email
5. MAJ Fein, Discovery, 4 Apr 12 Email

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Response

to Defense Motion to Compel  
Identification of Brady Materials  
Enclosure 1

24 May 2012

**From:** David Coombs  
**To:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; "Tooman, Joshua J CPT USARMY (US)"  
**Cc:** melissa.s.santiago.mil@mail.mil; Morrow III, JoDean\_CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H, CPT USA JFHQ-NCR/MDW SJA; VonEiten, Alexander S, 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D, CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Classified Information  
**Date:** Thursday, April 19, 2012 8:34:07 PM

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Ashden,

Here are the answers to your questions:

- 1) The classified information will remain at Fort Meade and Fort Myer. The Fort Meade location will be used to provide the Defense with access to classified information during any motions hearing and the trial. The Fort Myer location will be for our paralegal. Chief Santiago is PCSing in July. I believe her replacement will be given the same office that she currently is in at Fort Myer. Once CPT Tooman completes his PCS to D.C., we can move the Leavenworth safe to his office.
- 2) Computer forensic work: Currently, our forensic work is being done with CPT Bouchard acting as the government representative being present. In the future, we will have either CPT Bouchard, our paralegal or CPT Tooman present;
- 3) My access: When I am in VA, my access is covered by the Navy Security representative, Ms. Socorro Robillard. When I have access in MD, I am always with a government representative.
- 4) Courier Cards: Can you explain why the courier cards will need to be returned?

Please let me know if you have any questions or concerns.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
coombs@armycourt martialdefense.com  
www.armycourt martialdefense.com

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
[mailto:Ashden.Fein@jfhqncr.northcom.mil]  
Sent: Thursday, April 19, 2012 8:20 PM

To: Tooman, Joshua J CPT USARMY (US)

Cc: David Coombs; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
Subject: Classified Information

Josh,

Now that the other military defense counsel are no longer on the case, please notify us when all the classified information within their possession is properly secured by the defense experts, pursuant to the Court's order and their courier cards have been returned to relevant security managers. Also, please let us know which location the classified material will be stored, so we can properly account for the material.

Additionally, it is our understanding that in the past MAJ Kemkes, Paul, or Melissa were present, as government representative, with the forensic experts when conducting their review. What is the defense's plan in order to ensure a government representative (military or civilian) is present anytime classified information is being accessed, to include David's access in MD or VA?

Thank you!

v/r  
MAJ Fein





**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
**To:** "David Coombs"  
**Cc:** "Tooman, Joshua J CPT USARMY (US)"; "Santiago, Melissa S CW2 USARMY (US)"; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, John L CIV (US)  
**Subject:** RE: Outstanding Issues  
**Date:** Monday, April 23, 2012 7:30:16 PM  
**Attachments:** 120423-Section III Disclosures.pdf

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David,

1. For the FBI file, the United States provided the defense with, at a minimum, all information that we determined was discoverable under RCM 701(a)(6) and Brady. Redacted information falls outside RCM 701(a)(6) and Brady.
2. As explained before, Mr. Parra spoke with Eric Lakes and CPT Bouchard about this before the arraignment. Specifically, Mr. Parra spoke with CPT Bouchard on the phone and explained that the military defense counsel, as the government supervisors of the contract must submit a separate request to contracting because they are ultimately responsible for the unauthorized commitment of funds. Additionally, on 8 Feb 12, Mr. Parra spoke with Eric Lakes and CPT Bouchard on the phone and explained that in order to receive the payment for the unauthorized amount, both the military defense counsel and Eric Lakes had to deal directly with the contracting officer who issued the contract. The information is printed on the contract for the contractor and is Sherry L. Carner, (O) 703-696-7105, sherry.carner@us.army.mil. At the end of last week, the contract modification did not occur based on a funding issue; however today contracting is finalizing the modification. We will send the updated contract, once we receive it, but Mr. Lakes will receive a copy before we do. Still as of today, the defense has \$35,000 for forensic expert consultation.
3. The United States previously provided all the Section III disclosures up to arraignment. Under our continuing Section III obligation, the United States provides the attached updated disclosures for information produced since arraignment.
4. As per the Court's direction, the United States established a remote office in a government facility for you to work with classified information, including a printer. NWC has a printer available with the standalone classified laptop. As per our arrangement with the NWC, that printer is to be used to print any classified material to minimize couriering of classified material. Along with the printer, NWC is providing the toner or ink, and the prosecution is ready to send any additional supplies, if NWC requests. Please print the material at the government facility to minimize any possible security issues.
5. OCA POC Contact Information. The last OCAs that you should need contact information for are at CENTCOM. Please contact COL Bruce Pagel, Acting SJA, CENTCOM at bruce.pagel@centcom.mil to coordinate any conversations or meetings. This should be the remaining POC contact information. Please let us know whether there are others that you need assistance with obtaining. The United States still has not received a Touhy request for the other Agency, if the defense still intends to submit one.
6. Interim Forensic Reports. Today we delivered to CW2 Santiago a copy of the interim forensic reports (BATES: 00419805-00445503). We also FEDEXed a copy to NWC (Tracking: 798316692805).

v/r  
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]  
Sent: Saturday, April 21, 2012 6:35 PM  
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, John L CIV (US)  
Cc: Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US)  
Subject: Outstanding Issues

Ashden,

Please respond to the following issues before the end of Monday:

- 1) Who redacted the FBI discovery and under what standard?
- 2) What has the Government done to address the contract overage issue since January? Who in contracting has the Government being working with to resolve this issue?
- 3) You had indicated that you would be providing additional Section III disclosures to the Defense. When will these be provided? Also, why weren't these part of the original Section III disclosures?
- 4) When does the Government intend to provide hard copies to me at the NWC of the 793 Charged documents?

I intend to address each of the above issues during our next 802.

Best,

David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906

Toll Free: 1-800-588-4156

Local: (508) 689-4616

Fax: (508) 689-9282  
coombs@armycourt martialdefense.com <<mailto:coombs@armycourt martialdefense.com>>

[www.armycourt martialdefense.com](http://www.armycourt martialdefense.com) <<http://www.armycourt martialdefense.com/>>

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UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Response

to Defense Motion to Compel  
Identification of Brady Materials

Enclosure 3

24 May 2012

**From:** Fein, Ashden CPT USA JFHQ-NCR/MDW SJA  
**To:** coombs@armycourtmarshaldefense.com  
**Cc:** Kemkes, Matthew J MAJ MIL USA; paul.r.bouchard@us.army.mil; "Joshua Tooman"; Morrow, III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA  
**Bcc:** Fento, Beatriz SGT USA JFHQ-NCR/MDW SJA; Patta, Jairo A. WO1 USA JFHQ-NCR/MDW SJA; Wavbright, Daniel W. SGT USA JFHQ-NCR/MDW SJA; John CPT MIL USA Haberland (john.haberland@us.army.mil); Overgaard, Ansel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA  
**Subject:** US v. PFC BM (Discovery Update)  
**Date:** Thursday, September 01, 2011 11:12:00 AM

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David,

We placed a DVD in the mail today containing unclassified discovery (BATES: 042807-044864). This DVD includes multiple pretrial confinement documents from the confinement facilities. A copy is being delivered to MAJ Kemkes today.

v/r  
Ashden

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Response

to Defense Motion to Compel  
Identification of Brady Materials

Enclosure 4

24 May 2012

**From:** Fein, Ashden CPT USA JFHQ-NCR/MDW SJA  
**To:** coombs@armycourtmarshalddefense.com  
**Cc:** Kemkes, Matthew J MIL USA; paul.r.bouchard.mil@mail.mil; Joshua Tooman; melissa.s.santiago@us.army.mil; Morrow, Jill JoDean CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. WO1 USA JFHQ-NCR/MDW SJA  
**Bcc:** Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA; Feito, Beatriz SGT USA JFHQ-NCR/MDW SJA; Parra, Jaime A. WO1 USA JFHQ-NCR/MDW SJA; Waybright, Daniel W. SGT USA JFHQ-NCR/MDW SJA; John CPT MIL USA Haberland (john.haberland@us.army.mil)  
**Subject:** US v. PFC BM (Art 32 Report & Discovery)  
**Date:** Friday, January 13, 2012 4:02:00 PM  
**Importance:** High

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David,

Yesterday, we produced misc CID documents, an additional classification review for audit logs, and confinement documents (BATES: 00410702-00410788). We also sent a copy of the IO report to you and CPT Tooman. CW2 Santiago signed for the classified portions at Fort Myer. The tracking shows FEDEX delivered the CDs to you and CPT Tooman (Coombs: 876470104907; Tooman: 876470104860).

Have a good weekend.

v/r  
Ashden

) ) ) ) ) ) ) ) )

**V.**

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**Prosecution Response**  
to Defense Motion to Compel  
Identification of Brady Materials  
**Enclosure 5**  
24 May 2012

**From:** Fein, Ashden MAJ USA JFHO-NCR/MDW SJA  
**To:** coombs@armycourtmarshalddefense.com  
**Cc:** Ford, Arthur D. CW2 USA JFHO-NCR/MDW SJA; joshua.i.tooman.mil@mail.mil; matthew.i.kemkes.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHO-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHO-NCR/MDW SJA; paul.r.bouchard.mil@mail.mil; Whyte, Jeffrey H, CPT USA JFHO-NCR/MDW SJA; VonEiten, Alexander S, 1LT USA JFHO-NCR/MDW SJA  
**Bcc:** Bradley, Princeton L, SGT USA JFHO-NCR/MDW SJA; Feito, Beatriz SGT USA JFHO-NCR/MDW SJA; Parra, Jairo A, WO1 USA JFHO-NCR/MDW SJA; Waybright, Daniel W, SGT USA JFHO-NCR/MDW SJA; Haberland, John CPT USA Regimental Judge Advocate  
**Subject:** Discovery  
**Date:** Thursday, April 12, 2012 8:27:00 PM

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David,

Tonight, we FEDEXed the following:

To your office (Tracking: 7934 4983 5976)- unclassified material (BATES: 00419647-419804) consisting of various CID documents, unclassified but sensitive damage assessments / impact statements as part of our due diligence searches, the audio for the arraignment and motions hearing, and other miscellaneous documents.

To NWC for you (Tracking: 7934 4752 7495)- classified material, complete reproduction of previously produced classified material, the initial production of FBI material, but with corrected BATES numbers (BATES: 00412614-00417914), a new production of additionally approved FBI material (BATES: 00417915-00419518), and miscellaneous classified documents (BATES00419519-00419646).

Based on your previous request on the change of military defense counsel, we are working to finalize a complete reproduction of ALL material so you and your team have a fresh copy. Additionally, we intend to give you an updated Section III disclosure by the middle of next week.

Now that there is a change in military defense counsel, which office would you like us to send the information?

Thanks.

v/r

Ashden



y.

**Defense Reply to  
Government Response to  
Defense Motion to Compel Identification  
Identification of Brady Materials**

29 May 2012

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law and Rule for Courts Martial (R.C.M.) 701(a)(6), respectfully requests this Court to compel the Government to identify *Brady* material when providing discovery to the Defense.

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2).

3. The Defense relies on those facts set forth in its original filing on 10 May 2012.

4. The Defense stipulates to those facts set forth by the Government in their Response to Defense Motion to Compel Identification of *Brady* Material, dated 24 May 2012.

5. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this Court to consider the following evidence in support of the Defense's motion:

- Charge Sheet.
- Government assertions during various R.C.M. 802 sessions.
- Email chain, June 2011

6. The Defense submits that the Government's obligations under R.C.M. 701(a)(6) and *U.S. v. Brady*, 373 U.S. 83 (1963), should require it identify *Brady* disclosures to the Defense as part of

its ongoing discovery obligations. Whether employing the standard established by either the *Skilling* or *Salyer*, the circumstances are such that the requested relief is warranted.

7. The Government asserts that this court should weigh the factors considered by the *Skilling* court because *Skilling* is a published 5th Circuit opinion. While *Salyer*, cited by the Defense, is not a published opinion, the factors considered there have since been adopted by courts in cases that have resulted in a published opinion. See, *U.S. v. W.R. Grace*, 401 F.Supp.2d 1060, 1080 (D.Mont 2005). Moreover, it is important to note the test adopted by the *Salyer* court came into being when one of the scenarios contemplated by *Skilling* came before the court. The Defense's overarching position that the Government should be required to specifically identify *Brady* material is also one that is supported by cases that either are, or will be, reported. See *U.S. v. Hsia*, 24 F.Supp.2d 14 (D.D.C. 1998) and *U.S. v. Rubin*, --F.Supp.2d--, 2011 WL 5448066 (S.D.N.Y. 2011).

8. The factors set forth in *Salyer* are the appropriate factors for this Court's consideration. Again, each of these factors weighs heavily in the Defense's favor.

- a. PFC Manning has no opportunity to participate in his Defense in a meaningful way. It is unreasonable to expect the Defense to conduct all of its trial preparation within the walls of the JRCF. The space available at the JRCF is not sound proof and lacks internet and printing capabilities for the Defense. Moreover, the voluminous nature of the discovery in this case makes it impracticable for counsel to take the material to PFC Manning. Defense requests to meet with PFC Manning at the Fort Leavenworth TDS office have been consistently met with Government resistance due to the logistical hurdles the Government and JRCF have created for themselves.
- b. The Discovery provided by the Government is not text searchable and access requires travel by the majority of the Defense team.
- c. There are not multiple defendants, nor is there parallel civil litigation with overlapping discovery needs.
- d. As a Soldier in the U.S. Army, PFC Manning has no corporate assistance with his defense.
- e. The Defense team is relatively small compared to the Government's team. Not only is the Defense team geographically separated, but it is worth noting that, unlike Government counsel who are working exclusively on this case, detailed Defense counsel also represent other clients and do not have the ability to donate 100% of their time to the instant case. Additionally, after two years, the Government waited until virtually the eve of trial to begin providing the Defense with *Brady* materials. As such, Defense counsel are forced to spend valuable time sifting through discovery at a critical juncture in PFC Manning's case. Given the timing of the Government's disclosures, it is appropriate that they should specifically identify the *Brady* material.

9. Even *Skilling*, championed by the Government, contemplated scenarios where the Government should be required to identify *Brady* material. There, the court listed a number of scenarios where identifying *Brady* information should be required including: padding an open file, creating a voluminous file that is unduly onerous to access, and operating in bad faith in performing its *Brady* obligations. 554 F.3d at 577. Assuming, arguendo, that the *Skilling* standard is appropriate, each of the contemplated *Skilling* scenarios face the court in PFC Manning's case and warrant specific identification of *Brady* material by the Government.

a. The Government appears to be padding an open file.

The Government mentions in a footnote that the instant Defense request would require them to re-review hundreds of thousands of pages of discovery. If the Government is doing their due diligence, certainly they must be keeping track of what material they have determined falls under the purview of *Brady*. The Government's frequent assertions that a disclosure contains "at a minimum *Brady*" or "at least *Brady*" without actually keeping track of the *Brady* material suggests that the Government is, indeed dumping discovery on the Defense without first verifying that it does actually contain *Brady*. Either the Government is not being diligent and is dumping discovery on the Defense on the eve of trial or they have been diligent and have closely tracked the *Brady* material they have uncovered. If the later is true, it would not be difficult at all for the Government to specifically identify *Brady* material.

b. Access to discovery in this case is unduly onerous on the Defense.

Not only are there hundreds of thousands of pages of discovery in this case, the Defense and, most importantly, PFC Manning have limited access to the discovery. The Government points to the fact that multiple safes have been provided to the Defense as evidence that the Defense's access to evidence is not unduly onerous. Of particular note to the Government is the existence of a safe at Fort Leavenworth. However, it must be noted that while CPT Tooman is currently stationed at Fort Leavenworth and has had an attorney-client relationship with PFC Manning for over a year, CPT Tooman was only officially detailed to PFC Manning's case last month. Until recently, CPT Tooman's involvement with the Defense was merely tangential. As such, placement of a safe at Fort Leavenworth did little to aid in the preparation of the Defense with PFC Manning's detailed counsel thousands of miles away for the lion's share of his stay at the JRCF.

Moreover, while the ability to store sensitive discovery at Fort Leavenworth has been in place, the mechanisms put in place by the Government for PFC Manning to actually see the sensitive discovery are unduly onerous. It is unreasonable to expect the Defense to conduct trial preparation involving voluminous, classified discovery, within a confinement facility. Ironically, throughout this case the Government has balked at Defense requests to meet with PFC Manning at the Fort Leavenworth TDS office due the hoops it has to jump through to make such a meeting happen. *See attached emails*. If it is unduly onerous for the Government to facilitate a meeting between PFC Manning and his counsel in a TDS office, certainly it must be unduly onerous for the Defense to prepare in the same operating environment.

While the Government has provided electronic copies of its discovery, these electronic copies are not text searchable, a factor considered by the court in *Skilling*. Moreover, for the reasons discussed above and in the Defense's original motion, access to this discovery requires

significant travel by the majority of the Defense team. Again, most importantly, gaining PFC Manning access to the evidence against him is unduly onerous, as the Government has itself asserted since his movement to the JRCF. Because the Defense's access to the complete discovery is unduly onerous, as contemplated by *Skilling*, the Government should be obligated to specifically identify *Brady* material going forward.

- c. The Government's misunderstanding of its *Brady* obligation was tantamount to bad faith.


As recently as March 2012 the Government did not understand its requirements under *Brady* and R.C.M. 701(a)(6). This court acknowledged as much in its April 25, 2012 ruling on the Defense Motion to Dismiss All Charges With Prejudice, noting, "the Government disputed it was obligated to disclose classified *Brady* information that was material to punishment." For nearly two years the Government operated its discovery with a fundamental misunderstanding of what is required for disclosure. The fact that the Government took a wholly unsupported view of *Brady* and deliberately withheld what appears to be *Brady* material (i.e. damage assessments) for two years amounts to bad faith. Under the circumstances, the Defense believes that the Government's failure to apply the correct *Brady* standard warrants that they be required to specifically identify *Brady* material to the Defense.

10. Finally, the Government asserts that specifically identifying *Brady* material would result in the Government preparing the Defense case. The fact of the matter is that the Government is already reviewing every page of discovery and making a determination as to what should be redacted and what must be provided due to *Brady* or other discovery obligations. Requiring the Government to pick up a highlighter and mark what they have already identified as *Brady* material is not overly arduous. Indeed, it is not arduous at all. Given the fact that the Government has waited until this late date to begin providing the Defense with *Brady* material, requiring the Government to specifically identify *Brady* material is appropriate.

#### CONCLUSION

11. For the foregoing reasons, the Defense requests this Court require the Government to specifically identify all *Brady* material when providing discovery to the Defense.

Respectfully submitted,

  
JOSHUA J. TOOMAN  
CPT, JA  
Defense Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, xxx-xx-[REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE MOTION TO  
COMPEL DISCOVERY #2**

10 May 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (R.C.M.) 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703(f);

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

## BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

## EVIDENCE

3. The Defense does not request any witnesses be produced for this motion.<sup>1</sup> The Defense requests that this Court consider the following evidence in support of this motion:

- a. Appellate Exhibits VIII, XXVI, XXXI, XXXVI, XLIX, XLVIII, and LXVIII
- b. Unofficial Transcript, 23 February 2012
- c. Attachment A (Department of the Army Memorandum dated 17 April 2012)
- d. Attachment B (Email from Ashden Fein, 17 April 2012)

## FACTS

4. The following facts are based upon the Government's concessions in Appellate Exhibit XLIX and the Court's Ruling in Appellate Exhibit XXXVI and Appellate Exhibit LXVIII. There are four types of entities involved in this case that are relevant for the purpose of this motion: 1) Military organizations/entities; 2) Entities that participated in a joint investigation; 3) Other "closely aligned" agencies; and 4) Unrelated law enforcement agencies which were specifically identified by the Defense.

a) Military Organizations/Entities

**Army Criminal Investigation Command (CID).** The primary law enforcement organization within the Department of the Army focused on investigating the accused.

**Defense Intelligence Agency (DIA).** An intelligence agency within the DOD which operated the Information Review Task Force (IRTF), a DOD directed organization that was responsible for conducting a comprehensive DOD review of classified documents posted to the WikiLeaks website and any other associated materials.

**Defense Information Systems Agency (DISA)**

**United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM)**

b) Joint Investigations

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<sup>1</sup> The Defense requests the testimony of Ambassador Patrick Kennedy for the purposes of this motion if the Government maintains that the damage assessment items listed for the DOS within paragraph 16, *infra*, do not exist.

**FBI.** The primary law enforcement organization within the DOJ, focused on investigating matters related to the accused.

**Diplomatic Security Service (DSS).** The primary law enforcement organization within the Department of State (DOS), focused on investigating matters related to the DOS.

c) Closely Aligned Organizations

**Department of State.** The accused is charged with compromising the DOS's documents and the Government intends to use additional information from the Department during its case-in-chief.

**DOJ.** The Government collaborated with the federal prosecutors within the DOJ during the accused's investigation.

**Government Agency.** The accused is charged with compromising Government Agency's documents and the Government intends to use additional information from the Agency during its case-in-chief.

**Office of the Director of National Intelligence (ODNI).** The Government intends to use information from this Department during its case-in-chief.

**ONCIX.** The Court found in its ruling that ONCIX was a closely aligned agency. *See* Appellate Exhibit XXXVI at 11, paras. 4, 8.

d) Unrelated Law Enforcement Files Specifically Identified by the Defense

**Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;

**President's Intelligence Advisory Board.** Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;

**House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning. *See* Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII.

## ARGUMENT

### **A. Information That the Government Does Not Dispute is Under Military Control**

5. The Government agrees that information in the possession, custody, and control of CID, DIA, DISA, and CENTCOM and SOUTHCOM falls within R.C.M. 701(a)(2). While the Government has turned over some of this material, and is in the process of turning over the Information Review Task Force Report, the Defense renews its previous discovery requests for the entire files from these organizations related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks (to include any document, report, analysis, file, investigation, letter, working paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)).

6. In its Ruling on 23 March 2012 (Appellate Exhibit XXXI), the Court ordered the Government to report on whether DIA (among others) had any “investigative files relevant to this case.” The Government responded on 20 April 2012 that DIA did not have any investigative files relevant to this case. This was surprising to the Defense given that the 12 pages of *Brady* material that the Government had provided a week earlier revealed that the DIA did have what the Defense would consider “an investigation” into the alleged leaks.

7. Apparently, the Court and the Government took a much more narrow view of “investigation” than the Defense intended. It seems that the Government thought that the Defense was seeking only discovery of a formal investigation into the leaks (and perhaps files labeled as “Investigation”). The Defense did not intend in its discovery request for only formal investigations to be turned over to the Defense. Indeed, it has always requested broad discovery of all documents related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks.<sup>2</sup>

8. For the sake of clarity, the Defense requests that, to the extent that they have not yet been produced, the entire CID, DIA, DISA, and CENTCOM and SOUTHCOM files related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense. These files would include, but not be limited to, documents, reports, analyses, files, investigations, letters, working papers, and damage assessments (or anything that can be reasonably construed as falling within the aforementioned). These documents do not need to be formal investigative files in order to be in the purview of what the Defense requests. These documents are material to the preparation of the Defense as they will show what, if any, damage was caused by the alleged leaks which will help the Defense prepare both for the merits and sentencing, if necessary.

### **B. Joint Investigations and Closely Aligned Agencies**

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<sup>2</sup> For the purpose of this motion and subsequent motions, “damage” occasioned by the alleged leaks should be read broadly to include any mitigation efforts to correct such damage.



9. The Government acknowledges that the FBI and DSS participated in a joint investigation of this case. It also acknowledges that the DOS, DOJ, Government Agency, and ODNI are closely aligned with the Government in this case. The Court found that ONCIX was also closely aligned with the Government in this case. Where the requested discovery is in the possession of an entity that conducted a joint investigation or an entity that is closely aligned with the prosecution, the discovery is deemed to be in the “possession, custody, or control of military authorities” within the meaning of R.C.M. 701(a)(2).

10. R.C.M. 701(a)(2)(A) provides that, upon request of the Defense, the Government shall permit the Defense to inspect:

Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, *which are within the possession, custody, or control of military authorities*, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

(emphasis supplied). The Government has previously maintained that because the FBI and the DOJ are organizations not subject to a military command, then the requested materials are not within the possession, custody, or control of military authorities. See Appellate Exhibit XLIX.

11. As argued previously, the rule does not speak to whether other *organizations* such as the DOS, FBI, DOJ, ONCIX, ODNI, DSS, or Government Agency are under military control. Rather, it speaks to whether the books, papers, documents, etc. are within the “possession, custody or control” of military authorities. Whether a document is in the “possession, custody, or control” of military authorities is a legal question, not a factual one. See *United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995) (“[T]his issue involves a legal determination of the meaning of ‘in the possession of the government[.]’”). Although the issue of what items are legally considered to be in the “possession, custody or control” of military authorities appears to be a question of first impression in military courts, it has frequently arisen in federal courts. See Fed. R. Crim. P. 16 (the federal court equivalent to R.C.M. 701(a)(2)); see also *United States v. Stone*, 40 M.J. 420, 422 n.1 (C.M.A. 1994) (when discussing R.C.M. 701(a)(2), noting that “a similar right to discovery [is] provided in Fed. R. Crim. P. 16”); Drafer’s Analysis, *Manual for Courts–Martial, Rule 701 Discovery* (“(a) Disclosure by the trial counsel. This subsection is based in part on Fed. R. Crim. P. 16(a), but it provides for additional matters to be provided to the defense . . . [R.C.M. 701(a)(2)] parallels [then–]Fed. R. Crim. P. 16(a)(1)(C) and (D) [now Fed. R. Crim. P. 16(a)(1)(E)]”).

12. The language of Fed. R. Crim. P. 16 and R.C.M. 701(a)(2) is nearly identical, except that the federal rules use the term “government” instead of “military authorities.”<sup>3</sup> The term

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<sup>3</sup> Rule 16(a)(1)(E) reads as follows:

Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is *within the government’s possession, custody,*

"government" under Rule 16 is synonymous with "prosecution" or "trial counsel." See *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) ("Binding precedent has construed the term government in Rule 16(a)(1) to refer to the defendant's adversary, the prosecution, given the repeated references to the attorney for the government in 16(a)(1)(A), (B) and (D) and 16(a)(2), and language in [then-]16(a)(1)(C) referring to papers and documents intended for use by the government as evidence in chief at the trial." (internal quotations omitted)). Although the military rule parallels Fed. R. Crim. P. 16(a)(1)(E), R.C.M. 701(a)(2) is intended to be broader than its federal counterpart, in that it requires that the Government turn over not only evidence which is within trial counsel's control, but *also* in the control of military authorities generally.<sup>4</sup>

13. The key under both of these rules is determining when a given item is considered to be within a prosecutor's "possession, custody, or control." Since military courts have not addressed this issue directly, federal court precedent is instructive in determining how the phrase "possession, custody, or control" under R.C.M. 701(a)(2) should be interpreted.

14. The Defense incorporates its analysis of federal precedent to interpret "possession, custody, or control" from Appellate Exhibit XLVIII. It is clear that under federal law, a prosecutor cannot evade his discovery obligations under the federal equivalent to R.C.M. 701(a)(2) simply by saying that the requested information is not in the possession, custody or control of the government. Instead, the prosecutor is required to either turn over material which: i) he has access to or knowledge of; or ii) is held by agencies that participated in a joint investigation of the accused or by agencies that are closely aligned with the prosecution.

15. R.C.M. 701(a)(2) must be interpreted to include information that is technically in the hands of a joint investigative agency or any other closely aligned agency. Otherwise, the trial counsel would "be allowed to avoid disclosure of evidence by . . . leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial; such evidence is plainly within his Rule 16 'control.'" *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). If R.C.M. 701(a)(2) were not interpreted in line with federal case law, all an Army prosecutor would need to do to evade his R.C.M. 701(a)(2) discovery obligations would be to involve aligned or cooperating agencies in the case and then ensure that these agencies kept the evidence that the prosecutors did not want disclosed in its entirety.<sup>5</sup> *United States v. Poindexter*, 727 F. Supp. 1470, 1478 (D.D.C. 1989) ("[S]everal courts have noted that a prosecutor who has had access to documents in other agencies in the course of his investigation cannot avoid his discovery obligations by selectively leaving the materials with the agency once

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or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E) (emphasis supplied).

<sup>4</sup> To avoid confusion, it is helpful to read R.C.M. 701(a)(2) as referring to matters within the possession, custody, or control of either trial counsel or military authorities. In this way, it parallels Rule 16, except that it allows for more generous disclosure, in that it includes items within military control as well.

<sup>5</sup> The Defense recognizes, of course, that the Government would still have an obligation under *Brady* to produce favorable evidence.

he has reviewed them.”). This does not comport with the spirit of R.C.M. 701(a)(2), nor the letter of Rule 701(a)(2), properly construed. *See also* Article 46, UCMJ (“The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”).<sup>6</sup>

16. Under R.C.M. 701(a)(2), the Court should conclude that the below-requested discovery by the Defense is within the “possession, custody, or control” of the Government and compel the Government to produce the requested discovery from those agencies that participated in a joint investigation or are closely aligned. If any such agency does not voluntarily provide the requested information, the Court should order production of the requested information under R.C.M. 703(f)(4)(B). The use of R.C.M. 703(f)(4)(B) recognizes that although not factually within the “possession, custody, or control” of the Government, the items are legally within the “possession, custody, or control” of the Government. *See* Appellate Exhibit LXVIII (“[T]he fact that information controlled by another agency is discoverable under RCM 701 may make such information relevant and necessary under RCM 703 for discovery.”).

a) **FBI.** The Government has produced what it has characterized as “at least *Brady*” material from the FBI file. The Government has submitted heavily redacted FBI files to the Defense. As the Court has already concluded, the requirements for discovery and production of the evidence are the same for classified and unclassified information. The only exception is when the Government moves for limited disclosure under M.R.E. 505(g)(2) or claims the M.R.E. 505 privilege for classified information. In the instant case, the Government has not moved for a limited disclosure nor has it asserted the privilege on behalf of the FBI. As such, the Government cannot submit to the Defense a redacted version of the FBI file when such a file is within its possession, custody or control.<sup>7</sup> The Government’s belief that it can unilaterally redact information stems from its erroneous understanding of classified discovery. In the Government’s motion argument the following was stated in response to the Court’s question:

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<sup>6</sup> R.C.M. 701(a)(2) must be read consistently with federal case law to include documents that are maintained or held by agencies that are jointly investigating the accused or agencies that are closely aligned with the prosecution. If it were not so read, then defendants in federal cases would benefit from much broader discovery rights than their military counterparts, as those defendants would have access under Rule 16(a)(1)(E) to documents of agencies involved in joint investigations or agencies that are closely aligned with the prosecution, while military accuseds would not. This, in turn, could not be reconciled with the repeated statements of military courts that military discovery is much broader than that available in civilian courts. *See United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) (“Discovery in military practice is open, broad, liberal, and generous.”); *United States v. Simmons*, 38 M.J. 376, 380 (C.M.A. 1993) (“Congress intended more generous discovery to be available for military accused.” (emphasis omitted)); *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) (“[D]iscovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants.”); *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980) (“Military law has long been more liberal than its civilian counterpart in disclosing the government’s case to the accused and in granting discovery rights.”); *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) (“The military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions.”).

<sup>7</sup> Then-CPT Fein also stated in oral argument, “And we have been working with the Federal Bureau of Investigation to turn over any material that would be pertaining to the accused. But because that information is classified that requires the procedures under M.R.E. 505.” *See* Unofficial Transcript from Motions Argument 23 February 2012, at 158. This quote recognizes that the Government has represented that it would turn over “any material” related to the accused (not only *Brady* material). This is a very strong indicator that this material is in the possession, custody and control of the Government.

MJ: I guess that is where I am going. How does M.R.E. 505 protect disclosure of classified information if the privilege is not invoked?

TC: Yes, ma'am. Because it gives the government the option to voluntarily--like--as Mr. Coombs pointed out, to voluntarily disclose information. *To disclose information with redactions [and] substitutions and if the defense doesn't have an issue with*, it doesn't require a court to make a ruling. And it goes all the way to the other extreme of the government invoking the privilege whole cloth and then as it is contemplated in the ah--excuse me, in the 'in-camera' review under M.R.E. 505(i), that if its--if there is an unjust result by which withholding, that the Court could then sanction the prosecution and the government.

[Unofficial Transcript from Motions Argument 23 February 2012, p. 157]

The Court has ruled that in order for M.R.E. 505 to apply, the Government must invoke a privilege. It cannot skip over the invocation of the privilege and go straight to unilateral redactions and substitutions. Accordingly, the Defense moves to compel disclosure of the full FBI file as it pertains to the accused, WikiLeaks and/or the alleged leaks. If the Government wishes to make redactions, it must follow the proper procedure under M.R.E. 505 for doing so.

b) **Diplomatic Security Service (DSS).** The Government has turned over limited files from its joint investigation with DSS. The discovery provided deals only with the item charged in Specification 14 of Charge II. The Government has not turned over any DSS files or investigation dealing with Specifications 12 or 13 of Charge II. The Defense moves for the full DSS file as it pertains to the accused, WikiLeaks and/or the alleged leaks.

c) **Department of State.** The Government has provided the Court what is has stated is the only document that addresses the ongoing DOS damage assessment and review (what the Government refers to as "the damage assessment"). The Government has not provided, to the Defense's knowledge, any documents related to the following:

- (1) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the overall effect that the WikiLeaks release could have on relations within their host country, if any;
- (2) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;
- (3) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND
- (4) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared

twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

The Defense moves for each of these specifically-requested items, as well as any other documents related to the accused, WikiLeaks and/or the alleged leaks.<sup>8</sup>

d) **DOJ.** The Government collaborated with the federal prosecutors within the DOJ during the accused's investigation. The Government has not turned over any substantive material related to this investigation from the DOJ. The Defense moves for any documents from the DOJ related to the accused, WikiLeaks and/or the alleged leaks.

e) **Government Agency.** The accused is charged with compromising Government Agency's documents and the Government intends to use additional information from the Agency during its case-in-chief. The Government has yet to produce any internal investigation (to include working papers and other internal documents, reports or files) or damage assessment from this agency. The Defense moves for any documents from Government Agency related to the accused, WikiLeaks and/or the alleged leaks.

f) **Office of the Director of National Intelligence (ODNI).** The Government intends to use information from this Department during its case-in-chief. Yet, the Government has not turned over any documents by ODNI. The letter to ODNI from the Assistant General Counsel of the Federal Trade Commission regarding the "documents that were compromised in the Department of State's Net-Centric Diplomacy database" clearly shows that ODNI has conducted some sort of internal review of the cables. See Attachment to Appellate Exhibit XXXI. The Defense moves for any documents from ODNI related to the accused, WikiLeaks and/or the alleged leaks.

g) **ONCIX.** The Government has claimed this agency does not have any forensic reports, investigation, or damage assessment. However, the 12 pages of *Brady* material produced to the Defense clearly indicates that ONCIX has material responsive to the Defense's request under R.C.M. 701(a)(2). See *id.* As such, the Defense moves for any documents from ONCIX related to the accused, WikiLeaks and/or the alleged leaks.

17. The Court should conclude that the files from the above listed agencies are within the possession, custody, or control of the Government under R.C.M. 701(a)(2) and order that all the requested documents be produced to the Defense.

### **C. The Government's *Brady* Search**

18. The Government has a due diligence duty to search for evidence that is favorable to the defense and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); R.C.M. 701(a)(6). The trial counsel's due diligence duty applies to: "(1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offense;

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<sup>8</sup> Again, to avoid any confusion, the Defense is requesting any document, report, analysis, file, investigation, letter, working paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)) related to the accused, WikiLeaks and/or the damage occasioned by the leaks. If the Government maintains that such documents do not exist, the Defense requests Ambassador Patrick Kennedy be required to testify regarding the above information.

(2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.” *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999) (internal quotations and citations omitted).

19. “For relevant files known to be under the control of another governmental entity, Trial Counsel must make the fact known to the Defense and engage in good faith efforts to obtain the material.” Appellate Exhibit XXXVI at 8, para. 3. The Defense has requested specific information from within a specified entity in at least the following three instances:

a) **Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff’s Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case;

b) **President’s Intelligence Advisory Board.** Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board; and

c) **House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning.

See Defense Discovery Request Dated 8 December 2010, 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII.

20. The Government has failed to inform the Defense that the requested files were under the control of another government entity and has also failed to document its good faith efforts to obtain the requested relevant material. The Government should be required to state the steps it has taken to comply with its requirements under R.C.M. 701(a)(6). Specifically, the Government should respond to the following four questions:

a) Has the Government attempted to contact the identified agency to conduct a *Brady* review under R.C.M. 701(a)(6)?

b) When did the Government make its inquiry?

c) How many documents did the Government review?

d) What were the results of the Government’s inquiry? In particular, do any of these discovery requests contain *Brady* material?

21. The Defense also requests that the Court order the Government to respond to the above questions not only for these three specific requests, but for all agencies that the Government has

contacted to conduct a review under R.C.M. 701(a)(6) to ensure that it has, in fact, complied with its *Brady* obligations.

22. The Defense to date has received only 12 pages of *Brady* material (and apparently, some *Brady* material may be buried within the FBI file). The Defense believes, based on the 12 pages of *Brady*, that other organizations have similar documents, files, assessments, working papers, reports, etc. that support the Defense's argument that the alleged leaks did little to no damage. The Defense thus requests that the aforementioned questions be answered for each of the 63 relevant agencies, and any other organization that the Government contacted for *Brady* information.<sup>9</sup> At the very least, the Government should be prepared to state, on the record, that its search of the 63 relevant agencies and other organizations it has contacted has not yielded any *Brady* material (i.e. material that is favorable to the accused, in that it reasonably tends to reduce guilt, negate guilt, or *reduce punishment*). In making such a statement, the Government should provide a statement of exactly what it asked for from these agencies.

23. The Defense further requests that the Government provide *Brady* material from the specifically-mentioned agencies and files in Part (A) and (B) of this motion and/or state that it has reviewed the relevant files and that there is no *Brady* information within these files. In particular, the Defense requests that the Government provide *Brady* material from the following files:

a) Files that the Government does not dispute are within military custody, possession and control under R.C.M. 701(a)(2) (i.e. CID, DIA, DISA, and CENTCOM and SOUTHCOM);

b) Files that the Defense believes are within the custody, possession and control of military authorities under R.C.M. 701(a)(2) because such agencies have conducted a joint investigation or are closely aligned with the prosecution. In particular, the Defense requests *Brady* material from the following agencies:

(1) **FBI.** The Government has produced what it has characterized as "at least *Brady*" material from the FBI file. The Defense requests that the Government specify what it believes is *Brady* material and certify that this is the only *Brady* material contained in the entire FBI file.

(2) **Diplomatic Security Service (DSS).** The Defense requests that the Government produce all *Brady* material from DSS, or certify that such *Brady* material does not exist.

(3) **Department of State.** As indicated, the Government has not provided any documents related to the following:

(i) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the

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<sup>9</sup> Question A for all other agencies that the Government has contacted to conduct a review under R.C.M. 701(a)(6) should be changed to require a response to "Which specific agencies has the Government contacted to conduct a *Brady* review under R.C.M. 701(a)(6)?"

overall effect that the WikiLeaks release could have on relations within their host country, if any;

(ii) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;

(iii) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND

(iv) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

The Defense requests that the Government produce *Brady* material from each of these specifically-requested items as well as *Brady* material from the entire DOS file related to the accused, WikiLeaks and/or the alleged leaks, or certify that such *Brady* material does not exist.

(4) **DOJ.** The Defense requests that the Government produce all *Brady* material from the DOJ, or certify that such *Brady* material does not exist.

(5) **Government Agency.** The Defense requests that the Government produce all *Brady* material from Government Agency, or certify that such *Brady* material does not exist.

(6) **Office of the Director of National Intelligence (ODNI).** The Defense has already received some *Brady* material related to ODNI. The Defense requests that the Government produce all *Brady* material from ODNI, or certify that such *Brady* material does not exist.

(7) **ONCIX.** The Defense has already received some *Brady* material related to ONCIX. The Defense requests that the Government produce all *Brady* material from ONCIX, or certify that such *Brady* material does not exist.

24. In summation, the Defense requests:

a) *Brady* material from the Interagency Committee Review; the President's Intelligence Advisory Board; the House of Representatives Oversight Committee;

b) *Brady* material from files that the Government does not dispute are within military custody, possession and control under R.C.M. 701(a)(2) (i.e. CID, DIA, DISA, CENTCOM and SOUTHCOM) and *Brady* material responsive to the 17 April 2012 HQDA Memo (discussed below).



c) *Brady* material from files that the Defense believes are within the custody, possession and control of military authorities under R.C.M. 701(a)(2) because such agencies have conducted a joint investigation or are closely aligned with the prosecution (i.e. FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX);

d) That the Government respond to the following four questions in respect to each of the aforementioned requests:

- (1) Has the Government attempted to contact the identified agency to conduct a *Brady* review under R.C.M. 701(a)(6)?
- (2) When did the Government make its inquiry?
- (3) How many documents did the Government review?
- (4) What were the results of the Government's inquiry? In particular, do any of these discovery requests contain *Brady* material?

e) That the Government respond to the following four questions in respect to each of each of the other 63 agencies and other organizations it has contacted in its search for *Brady* material:

- (1) Which agencies did the Government contact to conduct a *Brady* review under R.C.M. 701(a)(6)?
- (2) When did the Government make its inquiry?
- (3) How many documents did the Government review?
- (4) What were the results of the Government's inquiry? In particular, do any of these discovery requests contain *Brady* material?

25. The Defense has consistently maintained – and continues to maintain – that the Government has not understood its *Brady* obligations. The Defense also believes that, to the extent that the Government is conducting a *Brady* search, it is not doing so in a diligent and timely manner.

26. The Defense has just learned that on 29 July 2011, the Government sent out a memo to Headquarters, Department of the Army requesting it to task Principal Officials to search for, and preserve, any discoverable information.<sup>10</sup> See Attachment A (Department of the Army Memorandum dated 17 April 2012). According to a 17 April 2012 Memorandum for Principal Officials of Headquarters, Department of the Army, “[i]t was only recently determined that no action had been taken by HQDA pursuant to the 29 July 11 memo from DOD OGC.” *Id.* This memo shows that no action had been taken by HQDA for *nine months* in response to the Government's request for *Brady* and other potentially discoverable material. In other words, the

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<sup>10</sup> The Defense also requests that this Court compel production of the HQDA file related to the 17 April 2012 request under R.C.M. 701(a)(2) and 701(a)(6).

Government has not yet completed a *Brady* search of its own files (i.e. files which are clearly in the possession, custody, and control of military authorities) even though two years have elapsed since PFC Manning was arrested. That the Government cannot “get its ducks in a row” with respect to discovery which is clearly under its control does not inspire confidence that the Government has diligently conducted a *Brady* search of other agencies.

27. In fact, there are huge questions and inconsistencies in the Government’s statements regarding its search for *Brady* material. *See also* Appellate Exhibits XXVI, XXXI, and XLVIII. For instance, the Defense received 12-pages of *Brady* material several weeks ago, detailing responses by various government agencies that the alleged leaks did little to no damage to those organizations. The Defense was troubled that it was only now receiving such *Brady* material. Based on the nature of that *Brady* material, the Defense believes there is much more similar *Brady* material out there that the Government has not disclosed. The Defense asked the Government why it was only now receiving such material. MAJ Fein’s response was as follows:

Since prior to referral, we have been coordinating with different federal organizations which we have reason to believe prepared an assessment, as a result of our continuing Williams and/or ethical obligations. Those organizations began providing us with these assessments as early as a few weeks ago and as recent as a few days ago. We adopted an efficient method of receiving, reviewing, and, if necessary, obtaining approval for the disclosure of the assessments, so that we can produce the discoverable portions, if any, to the defense as soon as possible. These assessments are the most current.

The prosecution will continue to produce as much information as authorized to mirror open-file discovery, but only pursuant to the authority we receive, based on balancing disclosure with protecting national security.

*See* Attachment B (Email from Ashden Fein, 17 April 2012).

28. There are several troubling aspects to MAJ Fein’s statement.<sup>11</sup> First, MAJ Fein states that although the Government has been coordinating with several different organizations (presumably the 63 organizations the Government has previously referenced), these organizations “began providing us with these assessments as early as a few weeks ago.” Apparently, the Government is saying that it took almost two years for organizations to provide the Government with discoverable information. It appears that, with the vast majority of the 63 organizations, the Government has yet to receive (much less disclose) *Brady* information. What is even more problematic is that the Government represented at an earlier 802 session that it had *already* searched the various agencies and that these agencies did not possess any *Brady* material. This makes no sense: either the Government has already searched the agencies and there is no *Brady* material, or the Government has not yet searched the agencies and there may be *Brady* material.

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<sup>11</sup> The Defense would point out that in this email, MAJ Fein himself referred to these interim documents four times as “assessments.” In light of this, the Government cannot claim it did not understand what the Defense was asking for when it asked for damage assessments or assessments of damage/harm to national security.

29. Second, the Government still seems to believe that it is the arbiter of what should or should not be disclosed in the interests of national security. It states that the prosecution will continue to provide as much information as authorized, “based on balancing disclosure with protecting national security.” Given that the email concerned documents which referenced damage from the leaks (or lack thereof), the discoverable material the Government was talking about was *Brady* material. The Defense reads the Government’s email as saying that it will conduct a balancing test to determine what *Brady* information is discoverable. As previously argued, it is not the role of the Government to balance the rights of the accused with national security.

30. Third, in response to the Defense’s question, “Additionally, some of these assessments are interim assessments. Do you have any follow up assessments?” at 6:42 pm on 16 April 2012, the Government replied at 9:47 on 17 April 2012 that “[t]hese assessments are the most current.” Given the incredibly short turn-around time on the Government’s response, it is hard to believe that the Government actually checked to see if these were the latest assessments. In fact, two things would support the fact that they may not be the most recent assessment of damage. These documents were prepared in November 2010, in the immediate aftermath of the leaks; it is likely that these agencies would also be asked to look into the longer-term impact of the leaks. Further, the Government has repeatedly stated that assessing damage is something that takes place over a period of years, not just at one snapshot of time. It is unlikely that an agency would simply rely on one snapshot in November 2010 to assess the impact of the leaks and then never return again to the issue.

31. The aforementioned is intended to provide concrete examples that the Government is not diligently fulfilling its *Brady* obligations. Regardless of whether the Government’s conduct amounts to a discovery violation, this Court has actual knowledge that things are remiss in the Government’s *Brady* search. Accordingly, this Court cannot continue to accept on faith that the Government has understood its *Brady* obligations and that it is diligent in fulfilling them. See *United States v. Cerna*, 633 F. Supp. 2d 1053, 1056 (N.D. Cal. 2009) (noting that “[t]he government is fond of saying that it knows its *Brady* obligations and will honor them.”); *United States v. Naegle*, 468 F. Supp. 2d 150, 152 n.2 (D.D.C. 2007) (“[N]ow that the Court realizes that its view of *Brady* and the government’s have not been consistent for many years, it no longer accepts conclusory assertions by the Department of Justice that it ‘understands’ its *Brady* obligations and ‘will comply’ or ‘has complied’ with them.”); *United States v. Lim*, No. 99 CR 689, 2000 WL 782964, at \*3 (N.D. Ill. June 15, 2000) (“The government’s response – which is and has been its stock response to such motions as long as the Court can recall – is that the government ‘recognizes its obligation’ to produce material pursuant to *Brady* and *Giglio*, that ‘the government will abide by the law,’ and that the motion should therefore be denied as ‘moot’ . . . [T]his Court does not believe that this is an appropriate way to deal with a matter as important as the government’s obligation to produce material that is favorable to an accused.”); *United States v. Hsia*, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) (“While the government has represented that it ‘understands its *Brady* obligations and it fully intends to abide by them,’ the Court shares defense counsel’s skepticism.” (citation omitted)). The latest memo from HQDA reveals the Government’s utter lack of diligence in undertaking its *Brady* search. Why would the Government wait until over a year after preferral of charges to begin its search for *Brady* material? How could the Government not have noticed that for nine months, it had not received any material from any principal officials in the Army? If the Government cannot even search its

own files properly, how can we believe them when they say they have diligently searched the files of other organizations? In order to ensure that the Government has done what it actually claims it is doing, it must provide an accounting for its *Brady* search. If the Government has nothing to hide, then it should not object to providing this Court and the Defense with a comprehensive accounting of its *Brady* search.

#### **D. The Government's Evidence in Merits and Sentencing**

32. The Government has a requirement, after service of charges, upon request of the Defense, to permit the Defense to inspect material intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial. R.C.M. 701(a)(2). Additionally, upon request of the Defense, the trial counsel shall permit the Defense to inspect written material that will be presented at the presentencing proceedings. R.C.M. 701(a)(5)(A). The Government has indicated that it intends to use information from at least the DOS, Government Agency, and ODNl. The Defense has previously requested timely access to this information, and the Court indicated that it would not allow the Government to wait until the eve of trial to provide access to the requested information.

33. The trial is currently scheduled to begin on 21 September 2012. The Defense believes that timely access to this information should begin now. The Government has had over two years to cull through the charged information and review documents from the various named agencies. During this time, the Government has been permitted to select which information it believes should be used for merits and which for sentencing. The Defense has not had equal access to this same information, or the ability to factor this information into the defense's theory on the merits or any possible sentencing case. The requested information is material to the preparation of the defense, and should be turned over immediately. To allow the Government to restrict the Defense's access to this information is to provide the Government with an unfair tactical advantage that will likely prejudice PFC Manning's right to a fair trial.

#### CONCLUSION

34. In accordance with the above, the Defense requests that the Court order that:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).

b) FBI, DSS, DOS, DOJ, Government Agency, ODNl, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703;

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. Coombs', written over a horizontal line.

DAVID EDWARD COOMBS  
Civilian Defense Counsel

# ATTACHMENT A



DEPARTMENT OF THE ARMY  
OFFICE OF THE CHIEF OF STAFF  
200 ARMY PENTAGON  
WASHINGTON DC 20310-0200

S: 23 April 2012

DAJA-CL

APR 17 2012

MEMORANDUM FOR PRINCIPAL OFFICIALS OF HEADQUARTERS, DEPARTMENT  
OF THE ARMY


SUBJECT: Preservation and Production of Records Relating to PFC Bradley E.  
Manning

1. Request your assistance in searching for and preserving any documents or files with material pertaining to: any type of investigation; working groups; resources provided to aid in rectifying an alleged compromise of government information; damage assessments of the alleged compromise; or the consideration of any remedial measures in response to the alleged activities of PFC Manning and WikiLeaks. See enclosures for further details. Provide an affirmative response with production of records, or a negative response, by 23 Apr 12 to the points of contact below.

2. My points of contact for this action are LTC Charles Lozano, commercial: 571-256-8132, email: [charles.lozano@us.army.mil](mailto:charles.lozano@us.army.mil) or MAJ Alyssa Adams, commercial: 571-256-8140, email: [alyssa.adams@us.army.mil](mailto:alyssa.adams@us.army.mil).

FOR THE SECRETARY OF THE ARMY:

Encls

  
WILLIAM J. TROY  
Lieutenant General, U.S. Army  
Director of the Army Staff

( FOUO )

<b>ARMY STAFFING FORM</b> For use of this form, see DA Memo 25-52, the proponent agency is AASA.		1. TRACKING NUMBER 120477882	2. TODAY'S DATE (YYYYMMDD) 20120411	3. SUSPENSE DATE (YYYYMMDD) 20120412																											
4. OFFICE SYMBOL DAJA-CL		5. SUBJECT SUBJECT: Preservation and Production of Records Relating to PFC Bradley E. Manning																													
6. ROUTING: (ECC USE ONLY) Initial Date		ECC POC <u>NOLITA Myers 697-25509</u> (Rank, Name, Phone): DIR, ECC <u>23 Apr 12</u>																													
<table border="1"> <tr><td>SA</td><td></td><td></td></tr> <tr><td>CSA</td><td></td><td></td></tr> <tr><td>USA</td><td></td><td></td></tr> <tr><td>VCSA</td><td></td><td></td></tr> <tr><td>AASA</td><td></td><td></td></tr> <tr><td>DAS</td><td><u>Myt 17 Apr 12</u></td><td></td></tr> <tr><td>SMA</td><td></td><td></td></tr> <tr><td>DUBA</td><td></td><td></td></tr> <tr><td>VDAS</td><td><u>16 Apr 12</u></td><td></td></tr> </table>		SA			CSA			USA			VCSA			AASA			DAS	<u>Myt 17 Apr 12</u>		SMA			DUBA			VDAS	<u>16 Apr 12</u>		COMMENTS: 12 Apr 12 10:00		
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7. EXECUTIVE SUMMARY / ACTION MEMORANDUM																															
<div style="border: 1px solid black; padding: 5px;"> <p style="text-align: center;"><b>Key Points</b></p> <ul style="list-style-type: none"> <li>The U.S. Army is prosecuting PFC Bradley E. Manning under the Uniform Code of Military Justice (UCMJ) for alleged illegal collection and disclosure of national defense and foreign relations information.</li> <li>The Army prosecutors are requesting the preservation and production of records relating to the court-martial case of U.S. v. PFC Manning.</li> <li>It was only recently determined that no action had been taken by HQDA pursuant to the 29 Jul 11 memo from DoD OGC.</li> </ul> </div>																															
Ref: DoD, Office of the General Counsel memo, dtd 29 Jul 11.																															
Encl: TAB A: Memo for DAS signature TAB B: OTJAG Criminal Law Division, memo dtd 29 Mar 2012. (Encl) TAB C: DoD OGC memo, dtd 29 Jul 2011.																															
1. Purpose: To obtain DAS approval on memo tasking HQDA Principal Officials to search for and preserve any documents or files pertaining to PFC Bradley E. Manning, and provide an affirmative response to OTJAG.																															
2. Discussion:																															
a. DoD OGC is requesting that HQDA search for and preserve any documents with material pertaining to: any type of investigation; working groups; resources provided to aid in rectifying an alleged compromise of government information; damage assessments of the alleged compromise; or the consideration of any remedial measures in response to the alleged activities of PFC Manning and WikiLeaks.																															
b. Any relevant evidence is to be preserved and provided to the prosecutors in the court-martial of PFC Bradley Manning for discovery purposes.																															
3. Recommendation: DAS approve and sign memo at TAB A.																															
<b>COMPLETED</b>																															
APPROVED	DISAPPROVED	NOTED	SEE ME	COMMENT																											



( FOUO )

10. REMARKS BY ECO: ☐ RETURNED REQUESTING ADDITIONAL INFORMATION/CLARIFICATION  
 10 Apr 1964 RECEIVED FROM OTSAG, 1 ATLAS RE CORRECTIONS ON REMARKS FROM E:  
 11 APR 12 1643 - RECEIVED CORRECTIONS FROM OTSAG (LW) **COMPLETED**  
 CR 1000

# ATTACHMENT B

**From:** "Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA"

<[Ashden.Fein@jfhqncr.northcom.mil](mailto:Ashden.Fein@jfhqncr.northcom.mil)>

(Add as Preferred  
Sender)

**Date:** Tue, Apr 17, 2012 9:47 am

**To:** "David Coombs" <[coombs@armycourt martialdefense.com](mailto:coombs@armycourt martialdefense.com)>

**Cc:** "Bouchard, Paul R CPT USARMY (US)" <[paul.r.bouchard.mil@mail.mil](mailto:paul.r.bouchard.mil@mail.mil)>,  
<[melissa.s.santiago.mil@mail.mil](mailto:melissa.s.santiago.mil@mail.mil)>, "Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA"  
<[JoDean.Morrow@jfhqncr.northcom.mil](mailto:JoDean.Morrow@jfhqncr.northcom.mil)>, "Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA"  
<[Angel.Overgaard@jfhqncr.northcom.mil](mailto:Angel.Overgaard@jfhqncr.northcom.mil)>, "Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA"  
<[Jeffrey.Whyte@jfhqncr.northcom.mil](mailto:Jeffrey.Whyte@jfhqncr.northcom.mil)>, "VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA"  
<[Alexander.VonElten@jfhqncr.northcom.mil](mailto:Alexander.VonElten@jfhqncr.northcom.mil)>, "Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA"  
<[Arthur.Ford@jfhqncr.northcom.mil](mailto:Arthur.Ford@jfhqncr.northcom.mil)>

David,

Since prior to referral, we have been coordinating with different federal organizations which we have reason to believe prepared an assessment, as a result of our continuing Williams and/or ethical obligations. Those organizations began providing us with these assessments as early as a few weeks ago and as recent as a few days ago. We adopted an efficient method of receiving, reviewing, and, if necessary, obtaining approval for the disclosure of the assessments, so that we can produce the discoverable portions, if any, to the defense as soon as possible. These assessments are the most current.

The prosecution will continue to produce as much information as authorized to mirror open-file discovery, but only pursuant to the authority we receive, based on balancing disclosure with protecting national security.

v/r

Ashden

-----Original Message-----

From: David Coombs [[mailto:coombs@armycourt martialdefense.com](mailto:mailto:coombs@armycourt martialdefense.com)]

Sent: Monday, April 16, 2012 6:42 PM

To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

Subject: RE: Discovery

Ashden,

With regards to #1, I am not clear when the Government received these assessments. I understand from your email that you reviewed the assessment over the past few weeks, but how long have you had these assessments? Additionally, some of these assessments are interim assessments. Do you have any follow up assessments?

Best,  
David

David E. Coombs, Esq  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
[coombs@armycourt martialdefense.com](mailto:coombs@armycourt martialdefense.com)  
[www.armycourt martialdefense.com](http://www.armycourt martialdefense.com)

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

[mailto:[Ashden.Fein@jhqncr.northcom.mil](mailto:Ashden.Fein@jhqncr.northcom.mil)]

Sent: Monday, April 16, 2012 5:48 PM

To: David Coombs; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III,

JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW

SJA; VonEiten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA

Cc: Tooman, Joshua J CPT USARMY (US); [melissa.s.santiago.mil@mail.mil](mailto:melissa.s.santiago.mil@mail.mil)

Subject: RE: Discovery

David,

Below are our responses to the applicable questions. The others should be OBE or subject to other emails today.

1) The prosecution has been working with many government agencies pursuant to our obligation to search for discoverable information under Williams. As we identify discoverable information, we seek approvals to release the information. Over the past few weeks, we reviewed these particular assessments; identified discoverable information contained within, obtained approvals to release them, and produced them to the defense as soon as possible.

2) The prosecution continues to review additional unclassified assessment(s), and will diligently work to obtain approvals to turn the discoverable portions, if any, over in discovery.

4) The United States will notify you of the individual, once we receive the information. We expect this decision in the next few days. Additionally, we will work to provide you contact information for the individual and/or setup a time prior to the motions hearing for you to interview the individual.

5) I am confident we can work on this as we move forward, but we are not in a position to send any as of yet. We will address this issue after the next motions hearing.

7) I will check with Mr. Parra about this issue.

8) The Department of State is processing your Touhy request and we were told that they might have an answer by the end of this week.

9) Please see your previous email at the very bottom.

A) Defense expert witnesses. We should be able to give you a comprehensive answer on the status of funding for your experts and their contract issues by Wednesday, as per my email last week. Once CW2 Parra returns this is his priority. They are currently funded for their travel tomorrow. SGT Feito is making their reservations and has been trying to contact them.

B) OCA POCs.

1. Rear Admiral David Woods (CDR Thomas Welsh, SJA, JTF-GTMO,

[Thomas.J.Welsh@jtfgtmo.southcom.mil](mailto:Thomas.J.Welsh@jtfgtmo.southcom.mil))

2. LT Gen Schmide (LTC Lisa Gumbs, OSJA, CYBERCOM at [lgumbs@nsa.gov](mailto:lgumbs@nsa.gov)) 3

Vice Admiral Robert Harward (should obtain tomorrow) 4. Rear Admiral Donegan

(should obtain tomorrow)

v/r  
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourtartialdefense.com]

Sent: Friday, April 13, 2012 5:57 PM

To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA

Cc: 'Tooman, Joshua J CPT USARMY (US)'

Subject: Discovery

Ashden,

I received the unclassified discovery today. Also, the classified discovery was received by NWC. I have arranged to see the facility next week at the NWC.

I have a couple of questions that I would like to have answers to:

- 1) With regards to the unclassified damage assessments provided in discovery, when did the Government receive these documents?
- 2) Are there any more unclassified damages assessments in the Government's possession?
- 3) Do you have an update on the 14 hard drives?
- 4) Who is the Government bringing from the Department of State for the motions hearing? Can you provide this person's contact information?
- 5) Are you planning on providing me with your proposed LIOs? If so, perhaps this is something we can agree upon
- 6) Did you receive the emails from COL Lind regarding her email problems?
- 7) I have forwarded the documentation regarding badges for my family. Has Mr. Parra heard anything on that issue?
- 8) Has the DOS provided any further updates on my Touhy request?
- 9) When does the Government plan to have PFC BM in the Fort Meade area? Additionally, is the plan to return him to the JRCF immediately after the 39(a) is completed? The Defense's preference would be to return PFC BM to military control at the JRCF.

Thank you for your attention to the above matters.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

Prosecution Response

to Defense Motion to  
Compel Discovery #2

24 May 2012

**RELIEF SOUGHT**

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all Defense Intelligence Agency (DIA), Defense Information Systems Agency (DISA), United States Central Command (CENTCOM), United States Southern Command (SOUTHCOM), and Headquarters, Department of the Army (HQDA) records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all Federal Bureau of Investigation (FBI), Diplomatic Security Service (DSS) Department of State (DoS), Department of Justice (DoJ), Government Agency, Office of the Director of National Intelligence (ODNI), and Office of the National Counterintelligence Executive (ONCIX) records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual or legal basis.

The prosecution continues its Williams and ethical search for Brady material and either has produced, or is diligently working to produce, any discovered material. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); see also Brady v. Maryland, 373 U.S. 83, 87 (1963) (favorable to the accused and material either to guilt or punishment).

## **BURDEN OF PERSUASION AND BURDEN OF PROOF**

As the moving party, the defense bears the burden of persuasion on any factual issue, the resolution of which is necessary to decide the motion. Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

## **FACTS**

The prosecution provides the following facts in support of this motion.

### **I: GOVERNMENT ORGANIZATIONS.**

The prosecution agrees with the defense that Army Criminal Investigation Command (CID), DIA, DISA, CENTCOM, and SOUTHCOM are military organizations or entities. See Def. Mot. at 2; see also Appellate Exhibit (AE) XLIX at 4-5; see also AE L at 2.

The prosecution agrees with the defense that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See Def. Mot. at 2; see also AE XLIX at 4-5; see also AE L at 4 (defense stated that “[n]o one is disputing what military authorities are”).

The prosecution has produced the entire CID case file relating to the accused, WikiLeaks, and/or the damage resulting from the charged offenses and understands its continuing obligation to produce any subsequent material.

The prosecution agrees with the defense that the FBI and DSS participated in a joint investigation with CID of the accused. See Def. Mot. at 2-3; see also AE XLIX at 4-5; see also DoD Directive 5525.7.

The prosecution agrees with the defense that the DoS, DoJ, Government Agency, and ODNI are entities closely aligned with the prosecution. See Def. Mot. at 3; see also AE XLIX at 4-5. The prosecution does not agree that ONCIX is an entity closely aligned with the prosecution. See Williams, 50 M.J. 441.<sup>1</sup> However, in light of the prosecution's existing obligation to search the files of ONCIX, the prosecution does not presently request reconsideration of the Court's ruling. See id.

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<sup>1</sup> The ONCIX is a subordinate organization to ODNI. See Office of the National Counterintelligence Executive, About Us, available at <https://www.ncix.gov/about.php> (last visited 22 May 2012). The prosecution is closely aligned with ODNI, however, the prosecution is not closely aligned with all its subordinate organizations, to include ONCIX. The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

The FBI is a subordinate organization to DoJ. The FBI and DoJ are not Department of Defense (DoD) agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the FBI or DoJ. See id.<sup>2</sup>

DSS is the security and law enforcement arm of the DoS. The DSS and DoS are not DoD agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the DSS or DoS. See id.<sup>3</sup>

The ODNI, ONCIX, and Government Agency are not DoD agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises control over the ODNI, ONCIX, and Government Agency. See id.

## **II: DEFENSE DISCOVERY REQUESTS.**

The prosecution agrees with the defense that, on 8 December 2010, the defense requested the discovery of the “results of any investigation or review by Mr. Russell Travers who has been appointed by President Obama to head an interagency committee assigned to assess the damage caused by Wikileaks exposures and to organize efforts to tighten security measures in government agencies.” Def. Mot. at 19(a). On 12 April 2011 and in response to the 8 December 2010 request, the prosecution responded that the “defense has failed to provide any basis for its request.” Attachment M to AE VIII. Since 12 April 2011, the defense has not provided any factual basis or legal authority for its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the discovery of “[a]ny report or recommendation concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff’s Senior Advisor for Information Access and Security Policy.” Def. Mot. at 19(a). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that the “defense has failed to provide an adequate basis for its request.” Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any factual basis or legal authority for its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the discovery of “[a]ny report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board.” Def. Mot. at 19(b). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that it “has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense” and that “[t]he defense is invited to renew its request with more specificity and an adequate basis for its

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<sup>2</sup> From the onset of this case, the prosecution has defined DoJ as Main Justice and the United States Attorney’s Offices, and not its subordinate organizations, to include the FBI. See AE XLIX at 5. The DoJ and FBI maintain distinct roles in this case and, as such, are not, and cannot be, synonymous for discovery purposes.

<sup>3</sup> From the onset of this case, the prosecution identified the distinct roles of DoS and DSS in this case. See AE XLIX at 4. The DoS and DSS are not, and cannot be, synonymous for discovery purposes.



request." Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any factual basis or legal authority for its request.<sup>4</sup>

The prosecution agrees with the defense that, on 10 January 2011, the defense requested the discovery of the "results of any inquiry and testimony taken by House of Representative oversight committee led by Representative Darrell Issa. The committee is due to look into Wikileaks, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning." Def. Mot. at 19(c). On 12 April 2011 and in response to the 10 January 2011 request, the prosecution responded that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense." Attachment M to AE VIII. Since 12 April 2011, the defense has not provided any additional information to support its request.

The prosecution agrees with the defense that, on 13 October 2011, the defense requested the "results of any inquiry and testimony taken by House of Representative oversight committee led by Representative Darrell Issa.. The committee discussed the actions of WikiLeaks, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning." Def. Mot. at 19(c). On 27 January 2012 and in response to the 13 October 2011 request, the prosecution responded that it "has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense" and that "[t]he defense is invited to renew its request with more specificity and an adequate basis for its request." Attachment M to AE VIII. Since 27 January 2012, the defense has not provided any additional information to support its request.

### **III: FORENSIC RESULTS OR INVESTIGATIVE FILES.**

On 20 April 2012, the prosecution notified the Court that the DoS has forensic results or investigative files, that the prosecution reviewed those materials for evidence that is favorable to the accused and material to either guilt or punishment, and that the prosecution has produced this material to the defense. See AE LVI.

On 20 April 2012, the prosecution notified the Court that the FBI has forensic results or investigative files and that the prosecution was reviewing those materials for evidence that is favorable to the accused and material to either guilt or punishment. See id. Since then, the prosecution has produced, at a minimum, all evidence from the applicable FBI forensic results or investigative files that is favorable to the accused and material to either guilt or punishment.

On 20 April 2012, the prosecution notified the Court that DIA and ONCIX do not have any forensic results or investigative files. See id.

On 2 May 2012, the prosecution notified the Court that the CIA has forensic results or investigative files and that the prosecution reviewed those materials for evidence that is favorable to the accused and material to guilt or punishment. See Enclosure. Since then, the

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<sup>4</sup> The prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board under its ethical responsibilities.

prosecution has produced, at a minimum, all evidence from the CIA forensic results or investigative files that is favorable to the accused and material to either guilt or punishment.

### WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the Appellate Exhibits referenced herein and the enclosure listed at the bottom of this motion.

### LEGAL AUTHORITY AND ARGUMENT

The prosecution respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all DIA, DISA, CENTCOM, SOUTHCOM, and HQDA records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all FBI, DSS DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual basis.

The prosecution continues its Williams and ethical search for Brady material and either has produced, or is diligently working to produce, any discovered material. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999); see also Brady, 373 U.S. at 87.

**I: THE DEFENSE HAS NEITHER PROVIDED SPECIFICITY NOR STATED AN ADEQUATE BASIS WITH ITS REQUEST FOR ALL DIA, DISA, CENTCOM, AND SOUTHCOM RECORDS RELATED TO THE ACCUSED, WIKILEAKS, AND/OR DAMAGE RESULTING FROM THE CHARGED OFFENSES.**

Rule for Courts-Martial (RCM) 701(a)(2) states that, upon defense request, the prosecution shall permit the defense to inspect materials within the possession, custody, or control of military authorities, "which are material to the preparation of the defense or are

intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused[.]” RCM 701(a)(2). The rule is triggered upon a defense request “specifying what must be produced.” RCM 701(a), analysis. The “request should indicate with reasonable specificity what materials are sought.” *Id.*; see also *United States v. Eshalomi*, 23 M.J. 12, 22 (C.M.A. 1986) (a request is specific when it gives “the prosecutor notice of exactly what the defense desire[s]”) (citing *United States v. Agurs*, 427 U.S. 97, 106 (1976) (a request for “‘all Brady material’ or for ‘anything exculpatory’ . . . gives the prosecutor no better notice than if no request is made”)).

RCM 701(a)(2) is “grounded on the fundamental concept of relevance.” *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). In order to have the military judge compel release of evidence either as discovery under RCM 701 or as evidence production under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See *id.* (holding that “the military judge did not abuse his discretion in determining that the defense did not present an adequate theory of relevance to justify the compelled production of the [document], the only piece of evidence identified with specificity in the defense request”) (the military judge did not abuse his discretion in declining to order the production of documents for which the defense failed to meet the burden to compel production); see also AE XXXVI at 9.

The defense argues all DIA, DISA, CENTCOM, and SOUTHCOM records relating to the accused, WikiLeaks, and/or damage resulting from the charged offenses are material to the preparation of a defense because “they will show what, if any, damage was caused by the [charged offenses] which will help the defense prepare both for the merits and sentencing, if necessary.”<sup>5</sup> The prosecution requests that this Court deny the defense’s request for discovery of all such records under RCM 701(a)(2) for two reasons: first, the defense failed to provide a specific request; and second, the defense failed to provide an adequate basis for why all such records are discoverable.

#### A. The Defense Failed to Provide Specificity in its Request.

The Court of Military Appeals in *Eshalomi* reasoned that a request is specific when it gives “the prosecutor notice of exactly what the defense desire[s].” *Eshalomi*, 23 M.J. at 22 (discussing whether the defense made a specific request for information pretrial) (citing *Agurs*, 427 U.S. at 106 (a request for “‘all Brady material’ or for ‘anything exculpatory’ . . . gives the prosecutor no better notice than if no request is made”)). Here, the defense requests the production of all DIA, DISA, CENTCOM, and SOUTHCOM records, to include all investigative files, related to the accused, WikiLeaks, and/or the damage resulting from the charged offenses under RCM 701(a)(2). The defense defines all records to “include, but not be limited to, documents, reports, analyses, files, investigations, letters, working papers, and damage assessments (or anything that can be reasonably construed as falling within the aforementioned).”<sup>6</sup> Def. Mot. at 4. Though broad in scope, the military discovery process is

<sup>5</sup> The defense clarified its request to include all documents related to the accused, WikiLeaks, and/or the damage occasioned by the alleged compromise. See Def. Mot. at 4.

<sup>6</sup> The defense’s request is a classic fishing expedition. See *United States v. Batchelor*, 19 C.M.R. 452, 525 (A.C.M.R. 1955) (defense may not expect “without basis in law or reason, . . . the personnel, files, papers, and

"not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait." United States v. Calley, 46 C.M.R. 1131, 1187 (A.C.M.R. 1973). Given the sheer breadth and substance of the charged misconduct, the prosecution is not on notice of what the defense desires when it requests all records from an organization relating to the accused, WikiLeaks, and/or any damage resulting from the charged offenses.<sup>7</sup> Accordingly, the defense has failed to provide a specific request.

#### B. The Defense Failed to Provide an Adequate Basis for Discovery.

RCM 701(a)(2) states that, upon defense request, the prosecution shall permit the defense to inspect materials within the possession, custody, or control of military authorities, "which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused[.]" RCM 701(a)(2). RCM 701(a)(2) is "grounded on the fundamental concept of relevance." Graner, 69 M.J. at 107. In order to have the military judge compel release of evidence either as discovery under RCM 701 or as evidence production under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See id.; see also AE XXXVI at 9.

Here, the defense argues all such records are discoverable under RCM 701(a)(2) (i.e., "material to the preparation of the defense") because the records "will show what, if any, damage was caused by the [charged offenses] which will help the defense prepare both for the merits and sentencing, if necessary." Def. Mot. at 4. Requesting all records, without limitation, does not demonstrate "an adequate theory of relevance" to justify the compelled discovery of such records. See Graner, 69 M.J. at 108. Absent establishing an adequate threshold standard of relevance, the information cannot be material to the preparation of the defense. See id. at 108. The basis for the request (i.e., what damage, if any, resulted will be material to the preparation of the defense) is inconsistent with the broad scope of the request (i.e., all records relating to the accused, WikiLeaks, and/or any damage from the above organizations).<sup>8</sup>

The defense defines "damage" in its request "broadly to include any mitigation efforts to correct such damage." Def. Mot. at 4.<sup>9</sup> Requesting any mitigation efforts to correct any damage

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resources of the Government be available and fully utilized, without restriction, as counsel might see fit in order to enable him to realize fulfillment of his purely exploratory requests, whether material or not, to pursue his theories of defense, whether with or without basis, and to engage in a pure fishing expedition, all irrespective of any unreasonableness or undue burden on the Government"; see also Graner, 69 M.J. at 108 (ruling that the defense shall "present an adequate theory of relevance to justify the compelled production of [documents]").

<sup>7</sup> Only damage assessments and working papers, relating to a damage assessment, have been specifically requested by the defense. Consistent with the Court Order, dated 23 March 2012, the prosecution is in the process of producing the only damage assessment from any of the above organizations - DIA. See AE XXXVI at 12. By DIA damage assessment, the prosecution means the IRTF damage assessment. The Secretary of Defense directed the DIA to establish the IRTF to lead a comprehensive DoD review of classified documents posted to the WikiLeaks website. See Enclosure to AE LXXII; see also AE XII at 5.

<sup>8</sup> The prosecution estimates all such records would consist of more than 250,000 pages.

<sup>9</sup> The defense's request to define damage "broadly" contradicts any argument that its request puts the prosecution on notice of what the defense desires.

caused by the charged offenses is inconsistent with the defense's proffered basis for its discovery (i.e., to "show what, if any, damage was caused by the [charged offenses]"). The prosecution agrees that some portions of the remedial process may be discoverable under RCM 701(a)(6), Brady, or if the defense can demonstrate an adequate theory of relevance (e.g., portions relevant to the charged offenses). See Graner, 69 M.J. at 108.

**II: THE DEFENSE HAS NOT PROVIDED AN ADEQUATE BASIS FOR WHY THE HEADQUARTERS, DEPARTMENT OF ARMY RECORDS, IN ITS ENTIRETY, IS DISCOVERABLE UNDER RCM 701(a)(2).**

The prosecution respectfully requests that this Court deny the defense request that the HQDA records be produced in their entirety under RCM 701(a)(2) and RCM 701(a)(6).<sup>10</sup> The prosecution recently received the HQDA records and has been reviewing the records for information discoverable under RCM 701(a)(6) and Brady under its ethical obligations. The prosecution will provide all information within the HQDA records that is discoverable under RCM 701(a)(6) and Brady. However, the defense has neither put the prosecution on notice of what the defense desires nor provided an adequate basis for why all information are "material to the preparation of the defense" under RCM 701(a)(2). The defense offers the conclusory assertion that all HQDA records responsive to the prosecution's request are discoverable under RCM 701(a)(2) without providing an adequate basis for why such records are "material to the preparation of the defense." Absent a specific request with an adequate basis, the prosecution requests that the Court deny discovery under RCM 701(a)(2).

**III: THE FBI, DSS, DOS, DOJ, GOVERNMENT AGENCY, ODNI, AND ONCIX FILES ARE NOT WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES.**

The prosecution respectfully requests that this Court deny discovery of all FBI, DSS, DoS, DoJ, Government Agency, ODNI,<sup>11</sup> and ONCIX records related to the accused and/or WikiLeaks under RCM 701(a)(2) because such files are not within the possession, custody, or control of military authorities. See RCM 701(a)(2). Further, the prosecution requests that this Court deny the defense's request for an *in camera* review of such records. In the alternative,

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<sup>10</sup> To clarify, the "HQDA file" referenced by the defense is not an actual "file." Instead, pursuant to its independent ethical obligations and not in response to a defense request, the prosecution requested that HQDA provide documents that may be discoverable under RCM 701(a)(6) and Brady. The documents responsive to the prosecution's request are those at issue. The prosecution has no knowledge of any "file" maintained by HQDA relating to the accused. See AR 25-400-2 (describing a file as an "accumulation of records maintained in a predetermined physical arrangement or to a place documents in a predetermined location according to an overall plan of classification"). Here, any documents responsive to the prosecution's request were not maintained in a predetermined physical arrangement or to a place documents in a predetermined location according to an overall plan. Instead, the HQDA records came from distinct subordinate organizations of the Department of Army. See Attachment A to Defense's Motion.

<sup>11</sup> The defense claims the prosecution "has not turned over any documents by ODNI." The defense is incorrect. The prosecution has produced ODNI documents to the defense. See, e.g., ODNI Classification Review (BATES 00410761-00410770); Intelink logs (BATES 00411153-00411154).

should the Court review the records *in camera*, RCM 701(a)(6) and Brady are the applicable standards of discovery for materials outside the possession, custody, or control of military authorities.

The question before this Court is whether all files of a non-DoD organization that the prosecution is required to search under Williams (i.e., (1) law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses and (2) an entity closely aligned with the prosecution) are within the possession, custody, or control of military authorities. Although there are no military cases defining “military authorities,” the plain language, scope and operation of RCM 701(a)(2), coupled with the CAAF ruling in Williams, confirm the term “military authorities” does not extend beyond DoD agencies operating under Title 10 status or subject to a military command. In the alternative, the prosecution does not have both access to, and knowledge of, the requested material.

The prosecution agrees with the defense that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See Def. Mot. at 2; see also AE XLIX at 4-5; see also AE L at 4 (defense counsel stated that “no one is disputing what military authorities are.”). None of the above organizations are DoD agencies operating under Title 10 status or subject to a military command. Neither DoD nor any military command exercises any control over the above organizations.

A. The Drafters Did Not Intend RCM 701(a)(2) to Extend Beyond the Files of Those Organizations Under Military Authority or Subject to Military Control.

The drafters promulgated RCM 701 to govern discovery after referral. See Graner, 69 M.J. at 107. RCM 701(a)(2) governs the discovery of materials within the possession, custody, or control of military authorities. See RCM 701(a)(2). Defining “military authorities” in this context is a matter of first impression. Absent controlling precedent on this issue, the “rules of statutory construction apply in interpreting the R.C.M.” United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (interpreting the provisions of RCM 705); see also United States v. Custis, 65 M.J. 366, 370 (C.A.A.F. 2007) (“[I]t is a well established rule that principles of statutory construction are used in construing the Manual for Courts-Martial in general and the Military Rules of Evidence in particular.”). The starting point for statutory interpretation is the plain or ordinary meaning of the language. See United States v. McCollum, 58 M.J. 323, 340 (C.A.A.F. 2003); see also Custis, 65 M.J. at 370 (“When the statute’s language is plain, the sole function of the courts... is to enforce it according to its terms.”); United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006) (“[A] fundamental rule of statutory interpretation is that ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’”) (citing Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 253-54 (1992); 2A Sutherland Statutory Construction § 45:2 (7th ed.)) (“[A] statute, clear and unambiguous on its face, need not and cannot be interpreted by a court.”).

The plain language of RCM 701(a)(2) states that:

[a]fter services of charges, upon request of the defense, the Government shall permit the defense to inspect: (A) any books,

papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities[.]

RCM 701(a)(2)(A). The plain language of the rule requires that the item be within the possession, custody, or control of a *military* authority. See Article 1, UCMJ (“military” refers to any or all of the armed forces”); see also RCM 102(b) (providing that the “rules shall be construed “to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expenses and delay.”). The prosecution defines “military authorities” to include DoD agencies operating under Title 10 status or subject to a military command. This definition is consistent with, or possibly broader than, its application in other court-martials and its interpretation with respect to other Rules for Courts-Martial. See Simmons, 38 M.J. at 381 (requiring trial counsel to make available for inspection a polygraph report in the possession of military investigative authorities); see also RCM 106, 301, 305(f), 405. The FBI, DSS, DoS, DoJ, Government Agency, ODNi, and ONCIX are not DoD agencies operating under Title 10 status or subject to a military command.

The defense’s argument hinges on the analysis of RCM 701(a)(2), which provides that the rule “parallels Fed. R. Crim. P. 16(a)(1)(C) and (D).” See Def. Mot. at 5; see also RCM 701(a)(2), analysis; Fed. R. Crim. P. 16(a)(1)(E) (“[U]pon a defendant’s request, the government must permit the defendant to inspect...[items]...within the government’s possession, custody, or control.”). The defense requests that the Court adopt the federal precedent for Rule 16, and not RCM 701(a)(2) defining what is in the possession, custody, or control of military authorities. The defense argues that federal precedent defines “government” under Rule 16 as the “prosecution.” Thus, according to the defense, Rule 16 can be synonymously read as follows: “upon defendant’s request, the [prosecution] must permit the defendant to inspect...[items]...within the [prosecution’s] possession, custody, or control.” Under defense’s argument, RCM 701(a)(2), in turn, would read as follows: “[U]pon request of the defense, the [prosecution] shall permit the defense to inspect...[items]...within the possession, custody, or control of *military authorities*.”

However, there are no cases that define “military authorities” under RCM 701(a)(2) to include the United States Government. Moreover, such a reading would contravene the drafter’s intention that RCM 701(a)(2) only apply to items within “military authorities.” The rules of discovery clearly contemplate word choice. See RCM 701(a)(1)(C) (relating to materials “in the possession of the trial counsel”). Though RCM 701(a)(2) parallels Rule 16, the two are not identical. Had the drafter intended the scope of RCM 701(a)(2) to apply to files within the possession, custody, or control of the United States Government, the drafters were free explicitly say so by replacing “military authorities” with “United States Government.”

The only military case cited by the defense in support of its proposition that RCM 701(a)(2) governs discovery of materials outside military authorities is Charles, a Court of Military Appeals case. See United States v. Charles, 40 M.J. 414 (C.M.A. 1994). In Charles, the defense requested to inspect the training and personnel records of two civilian police officers in the possession of the trial counsel. The trial counsel submitted the records to the military judge for an *in camera* review under RCM 701(g)(2), and the military judge denied discovery as not



being “material to the preparation of the defense.” On appeal, the issue was whether the military judge properly denied the defense’s request as not being “material to the preparation of the defense” – *not* whether the records were “within the possession, custody, or control of military authorities.” Whether the records were “within the possession, custody, or control of military authorities” was not an issue because the trial counsel submitted the records for *in camera* review under RCM 701(g)(2). The records at issue were in the possession of the trial counsel and the trial counsel had authority to produce the records for *in camera* review. The trial counsel had knowledge and access to the document. Those facts do not exist here.

Lastly, the prosecution requests that the Court consider the “administrative workability” of the provision. McCollum, 58 M.J. at 344 (Crawford, C.J., concurring) (citing Geier, 529 U.S. at 873). Extending the definition of “military authorities” beyond military commands or organizations subject to military control would carry drastic implications. Subjecting the files of all closely aligned organizations, under Williams, to open inspection, if “material to the preparation of the defense,” would result in a new graymail tactic, a “problem” in discovery practice. See, e.g., MRE 505, analysis; see also AE LIII at 4 (the defense previously highlighted that “the standard of materiality [relating to RCM 701(a)(2)] is not a high one”). Here, such a tactic would lead to nearly insurmountable consequences. For example, if an inspection of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX classified records “material to the preparation of the defense” is allowed, assuming such exist, the defense could flood the Court with MRE 505 procedures, stall the criminal proceeding, and, if the privilege under MRE 505 is invoked in light of national security concerns, inundate those agencies with classification reviews. See RCM 102(b) (“[T]hese rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expenses and delay.”). Such a result would incent future offenders to expose the files of victim agencies with knowledge that compromising information, particularly highly classified information, would likely stall the criminal proceeding.

#### B. The Defense’s Argument is Inconsistent with the CAAF Ruling in Williams.

The CAAF in Williams defined the prosecutor’s duty to search for information discoverable under RCM 701(a)(6) and Brady. See id. at 441. In Williams, the CAAF held that the prosecution must exercise due diligence in discovering favorable information and that the scope of this due diligence requirement extends beyond the prosecutor’s own files to include:

- (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity ‘closely aligned with the’ prosecution; and (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity.

See id. at 441; see also United States v. Mahoney, 58 M.J. 346, 348 (C.A.A.F. 2003) (“the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case”). Here, the prosecution shall search, *inter alia*, the files of law enforcement authorities that participated in a joint investigation (i.e., FBI and DSS) and the



investigative files in a related case maintained by an entity closely aligned with the prosecution (i.e., DoS, DoJ, Government Agency, and ODNI<sup>12</sup>) for RCM 701(a)(6) or Brady material. See Williams, 50 M.J. at 441. Contrary to Williams, the defense is requesting the prosecution to broaden its standard of review to include RCM 701(a)(2) material or, in the alternative, to broaden that which is within the prosecutor's own files to include those entities under Williams. See Def. Mot. at 13-4 (arguing that the prosecution has not completed its search for Brady material within "its own files" because the HQDA documents "are clearly in the possession, custody, and control of military authorities"). The CAAF in Williams did not intend such a result. The defense is confusing the RCM 701(a)(2) language with the prosecution's obligation to search for RCM 701(a)(6) and Brady material under Williams.

The prosecution shall search its own files, along with those outlined in Williams, for RCM 701(a)(6) and Brady material – not information that is "material to the preparation of the defense." The CAAF in Williams clearly contemplated all rules of discovery, to include RCM 701(a)(2), when it outlined what discovery standard the prosecution shall use when searching the files of law enforcement authorities that participated in a joint investigation and the investigative files in a related case maintained by an entity closely aligned with the prosecution. The CAAF cited RCM 701(a)(2), yet did not extend this standard to the prosecution's due diligence obligation because that obligation is to search for "favorable" material. See Williams, 50 M.J. at 441; see also Brady, 373 U.S. at 87. Requiring the prosecution to search the entities under Williams for 701(a)(2) material would subsume the ruling in Williams. The defense is confusing the RCM 701(a)(2) analysis with the prosecution's obligations under Williams.

The CAAF in Williams clearly identified the prosecutor's own files from the files of law enforcement authorities participating in the investigation and the investigative files of entities closely-aligned with the prosecution. The defense argues for the whole-cloth inclusion of all records the prosecution shall search under Williams as being "within the possession, custody, or control of military authorities." See Def. Mot. at 5. The defense's request to merge the files of law enforcement authorities participating in the investigation and the investigative files of closely-aligned entities with the prosecutor's own files for RCM 701(a)(2) purposes is inconsistent with Williams. See Williams, 50 M.J. at 441 ("the scope of the due-diligence requirement with respect to government files *beyond the prosecutor's own files* generally is limited to..." ) (emphasis added)).

The Court has previously held that the prosecution shall only search the above records for RCM 701(a)(6) and Brady material. See AE XXXVI at 12; see also AE LXIX at 2.

C. In the Alternative, the Prosecution does not have both Access to, and Knowledge of, All FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX Records relating to the Accused or WikiLeaks.

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<sup>12</sup> The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady. Further, ODNI does not maintain investigative files and is only closely aligned under Williams because they have contributed evidence for the merits.

Defining what is in the “possession, custody, or control of military authorities” is a matter of first impression in the military justice system. If the Court finds federal law instructive in this matter, then Rule 16 should be used as a persuasive authority for this issue. Federal courts interpret information “in the possession of the government” under Rule 16 to include information “of which the prosecutor has knowledge and to which the prosecutor has access.” United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989) (“[A] prosecutor need not comb the files of every federal agency which might have documents regarding the [accused] in order to fulfill his or her obligations under [Rule 16.]”). Whether the prosecution has knowledge of, and access to, information is a “factual determination[] that must necessarily be made on a case-by-case and agency-by-agency basis[.]” See United States v. W. R. Grace, 401 F.Supp.2d 1069, 1078 (2005); see also United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995) (stating, however, that the “meaning of ‘in the possession of the government’” is a legal question). In Santiago, the Ninth Circuit held that the government had access to Bureau of Prison files because “the government was able to obtain [the accused’s] prison file from the Bureau of Prisons.” Id., at 894 (stating that “the fact that the Bureau of Prisons and the United States Attorney’s Offices are both branches of the Department of Justice would facilitate access by federal prosecutors to prison files”).

The prosecution does not have both access to, and knowledge of, all FBI, DSS, DoS, DoJ, Government Agency, and ODNI records relating to the accused and/or WikiLeaks.<sup>13</sup> See Bryan, 868 F.2d at 1036. **To this date, outside what it has already produced to the defense, the prosecution has only limited access to the requested records for the purpose of satisfying its legal and ethical obligation to search for Brady and RCM 701(a)(6) material.** Unlike the facts in Santiago, the prosecution can neither obtain nor produce the requested records without the organization’s approval and the organizations are not DoD entities. The prosecution does not have approval to disclose all such records from the above organizations, outside those previously produced in discovery. The defense’s concern that the prosecution can avoid disclosure under RCM 701(a)(2) simply by keeping the documents in the hands of the agencies is misplaced because the prosecution has no authority to remove the documents from the agencies’ hands.

This Court previously contemplated this issue. On 21 March 2012, the Court requested that the prosecution, *inter alia*, respond to whether it has “access” to the IRTF damage assessment. See AE XXXVI at 6-7. The prosecution responded that it “was given limited access for the purpose of reviewing for any discoverable material. The prosecution only has control of the information within the document that is owned by the DoD (military authority).” See id., at 6. The Court made the finding that only “[s]ome of the information in the IRTF damage assessment is under the possession, custody, or control of military authorities.” Id., at 10. Similarly, the prosecution has been given limited access to the FBI, DSS, DoS, DoJ, Government Agency, and ODNI records relating to the accused and/or WikiLeaks for the purpose of reviewing for any favorable material, specifically RCM 701(a)(6) and Brady. See Williams, 50

<sup>13</sup> The prosecution is not closely aligned with ONCIX because they do not share a working relationship. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

M.J. at 441.<sup>14</sup> Should the prosecution not have authority to produce information not owned by DoD, the prosecution does not, and cannot, have access to the information for discovery purposes.

**IV: ASSUMING, ARGUENDO, THE COURT CONCLUDES THAT THE FBI, DSS, DOS, DOJ, GOVERNMENT AGENCY, ODNI, AND ONCIX FILES ARE WITHIN THE POSSESSION, CUSTODY, OR CONTROL OF MILITARY AUTHORITIES, THE DEFENSE CONTINUALLY FAILS TO PROVIDE A SPECIFIC REQUEST AND/OR AN ADEQUATE BASIS UNDER RCM 701(a)(2).**

Even assuming this Court concludes that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX files are within the possession, custody, or control of military authorities, the prosecution respectfully requests that the Court deny defense's request for all files from those organizations for failure to provide specificity or an adequate basis for its request. The defense has failed to put the prosecution on notice of what it desires and to provide an adequate basis for why the entire files are "material to the preparation of the defense." See RCM 701(a)(2); see also Calley, 46 C.M.R. at 1187 (the military discovery process is "not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait"). The prosecution adopts the arguments set forth above in support of its request to deny discovery under RCM 701(a)(2) of the entire files from the requested organizations. See supra Section I.

The defense further requests production under RCM 701(a)(2) of the following: (1) any Government Agency forensic results or investigative files and any damage assessment; (2) any documents relating to the Chiefs of Mission review, the WikiLeaks Working Group, the "Mitigation Team," and the DoS's reporting to Congress in December 2010; and (3) DSS files or investigations dealing with Specification 12 or 13 of Charge II.

The prosecution is in the process of disclosing, whether in limited disclosure or in its entirety, any Government Agency forensic results or investigative files and damage assessment that are discoverable under RCM 701(a)(6) and Brady. The prosecution respectfully requests that the Court deny defense's request for *all* Government Agency forensic results or investigative files for failure to provide specificity or an adequate basis for its request. See supra Section I.

The prosecution respectfully requests that the Court deny defense's request for any documents related to the Chiefs of Mission, WikiLeaks Working Group, "Mitigation Team," and DoS's reporting to Congress in December 2010 for failure to provide specificity or an adequate basis for its request. The prosecution further requests this Court deny defense's request to have Under Secretary of State for Management Patrick Kennedy be required to testify regarding the requested materials the defense has failed to provide specificity or an adequate basis for why the proffered testimony is relevant. See Graner, 69 M.J. at 108; see also Appellate Exhibit XV. Instead, the defense is requesting Under Secretary Kennedy's testimony as an alternative measure to accomplish its fishing expedition to learn of information to which it should request.

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<sup>14</sup> The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for RCM 701(a)(6) and Brady.

The prosecution has produced the DSS file relevant to this case. See Appellate Exhibit LVI. The prosecution respectfully requests that the Court deny defense's request for any DSS files or investigation dealing with Specifications 12 or 13 of Charge II for failure to provide specificity or an adequate basis for its request.

**V: ALL FBI, DSS, DOS, DOJ, GOVERNMENT AGENCY, ODNI, AND ONCIX DOCUMENTS ARE NOT RELEVANT AND NECESSARY UNDER RCM 703.**

Under RCM 703, "[e]ach party is entitled to the production of evidence which is relevant and necessary." RCM 703(f); see also RCM 401 (defining relevance); see also RCM 703(f)(1), discussion ("Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue."). RCM 703 requires that the defense "list the items of evidence to be produced and [] include a description of each item sufficient to show its relevance and necessity." RCM 703(f)(3); see also Graner, 69 M.J. at 108.

RCM 703 is "grounded on the fundamental concept of relevance." Graner, 69 M.J. at 108. In order to have the military judge compel the production of evidence under RCM 703, the defense must establish that the evidence is relevant either to the merits or to sentencing. See id. (holding that "the military judge did not abuse his discretion in determining that the defense did not present an adequate theory of relevance to justify the compelled production of the [document], the only piece of evidence identified with specificity in the defense request"); see also AE XXXVI at 9; see also Calley, 46 C.M.R. at 1187 (the military discovery process is "not designed to permit an accused to fish blindly for evidence with only hope for tackle and prayer for bait").

The defense requests the production under RCM 703 of all FBI, DSS, DoS, DOJ, Government agency, ODNI, and ONCIX documents relating to the accused and/or WikiLeaks. The defense has not provided an adequate basis for why all such documents are relevant and necessary under RCM 703. Further, the defense has not provided a description of each item sufficient to show its relevance and necessity. See RCM 703(f)(3). Absent a proper basis, all documents of each organization, as requested by defense, are not relevant and necessary under RCM 703.<sup>15</sup>

Assuming the FBI records are outside the scope of RCM 701(a)(2), should the defense submit a specific request and provide a proper basis, the FBI records are only discoverable under RCM 701(a)(6) and Brady, and only subject to production under RCM 703. Any material that falls outside these rules generally is not subject to disclosure.<sup>16</sup> The defense argues the prosecution "cannot submit to the defense a redacted version" of documents in discovery, but instead the prosecution must follow the proper procedure under MRE 505. See Def. Mot. at 7-8. Under this logic, for instance, the prosecution shall disclose an entire file *per se* when only a few

<sup>15</sup> The prosecution estimates all such records would consist of more than 250,000 pages.

<sup>16</sup> The documents may be discoverable under Jencks and RCM 914.

sentences therein contain discoverable information. Such a result is inconsistent with any rule of discovery. MRE 505(g)(2) is only necessary when the prosecution requests "limited disclosure." Here, the prosecution submitted full disclosure of discoverable materials contained within the FBI records under MRE 505(g)(1). The defense has not provided an adequate basis or authority for why such material is relevant and necessary under RCM 703.

**VI: THE DEFENSE'S REQUEST FOR THE PROSECUTION TO RESPOND TO INQUIRIES RELATING TO ITS DUE DILIGENCE SEARCH FOR DISCOVERABLE INFORMATION IS WITHOUT A FACTUAL BASIS.**

The prosecution respectfully requests that the Court deny defense's request for the prosecution to respond to inquiries relating to its due diligence search for discoverable information. There is no legal authority to support defense's request.

Should the Court be inclined to order the prosecution to answer these questions or variations of these questions, the prosecution requests leave of the Court to enable the prosecution to prepare internal memoranda and other attorney work-product, and present this information to the Court *ex parte* under RCM 701(g)(2), based on it being attorney work-product. See RCM 701(g)(2).

**VII: THE PROSECUTION CONTINUES ITS WILLIAMS AND ETHICAL SEARCH FOR *BRADY* MATERIAL AND EITHER HAS PRODUCED OR IS DILIGENTLY WORKING TO PRODUCE ANY DISCOVERED MATERIAL.**

The prosecution shall disclose evidence that is favorable to the defense and material to guilt or punishment. See *Brady*, 373 U.S. at 87; see also RCM 701(a)(6). The prosecution continues its search under Williams and applicable ethical rules for RCM 701(a)(6) and Brady material and either has produced or is diligently working to produce any discovered Brady material. See *Brady*, 373 U.S. at 87. See also Appellate Exhibit XLIX.

On 23 March 2012, the Court ordered the prosecution to produce or disclose Brady material contained within the three damage assessments. See AE XXXVI at 12. On 18 May 2012, the prosecution complied with this Order. The Court further ordered the prosecution to search all DoS, FBI, DIA, ONCIX, and CIA forensic results or investigative files, if any, for Brady material. The prosecution has produced this material. See Enclosure.

The prosecution shall, and will, disclose Brady and RCM 701(a)(6) material even in the absence of a defense request. See *Jackson*, 59 M.J. at 334. The prosecution has produced all classified and unclassified damage assessments that the prosecution discovered under its ethical obligations and for which it has approval to disclose. To date, the prosecution has disclosed twenty-seven damage assessments, pursuant to its ethical obligations and absent a defense request. The prosecution has retrieved eight additional assessments and continues to work diligently to obtain the approvals for those that contain discoverable information.

**VIII: THE PROSECUTION WILL DILIGENTLY CONTINUE TO PRODUCE ALL INFORMATION IT INTENDS TO USE IN ITS CASE-IN-CHIEF OR IMPLEMENT MRE 505 PROCEDURES, IF APPLICABLE.**

From the onset, the prosecution had a plan on how to efficiently handle the classified information and evidence in this case. Days after referral, the prosecution detailed its plan regarding the procedures, discovery, and production of classified and unclassified information. See AE XX. The prosecution explained the necessity for additional time to obtain approvals to produce classified information, to include coordinating with multiple original classification authorities and implementing MRE 505 procedures. See id.; see also AE XII.

The prosecution intends to use classified and unclassified information in its case-in-chief. See AE XII. The prosecution is diligently working to ensure that it has produced all information, unclassified and classified, that it intends to use in its case-in-chief. Based on the ongoing criminal investigations, additional information is continuously collected and found, and as that information is gathered, the prosecution produces the material that is discoverable under applicable discovery rules. Besides certain classified material which will likely require protections under MRE 505 and has been planned for under the Court's Scheduling Order, the prosecution has produced virtually all information that it intends to use in its case-in-chief.

**IX: THE PROSECUTION WILL DILIGENTLY CONTINUE TO PRODUCE ALL INFORMATION IT INTENDS TO PRESENT AT PRESENTENCING PROCEEDINGS OR IMPLEMENT MRE 505 PROCEDURES, IF APPLICABLE.**

The prosecution intends to present classified and unclassified information at presentencing proceedings, which the prosecution has contemplated from the onset of this case. See supra Section VIII. The prosecution has already produced unclassified and classified material that it intends to use during presentencing proceedings, and is diligently working to make available for inspection other written material, either through seeking limited disclosure under MRE 505(g)(2) or RCM 701(g), or by invoking the privilege under MRE 505 for portions of the material, as per the Court scheduling order.

**CONCLUSION**

In sum, the prosecution respectfully requests this Court deny, in part, the Defense Motion to Compel Discovery #2. The prosecution requests that this Court deny the following:

(1) the production, inspection, or *in camera* review of all DIA, DISA, CENTCOM, SOUTHCOM, and HQDA records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(2) the production, inspection, or *in camera* review of all FBI, DSS DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 701(a)(2) because such files are outside

the "possession, custody, or control of military authorities," or, in the alternative, for failing to provide a specific request or an adequate basis under RCM 701(a)(2);

(3) the production of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records related to the accused, WikiLeaks, and/or damage resulting from the charged offenses under RCM 703 for failing to provide a specific request or an adequate basis under RCM 703; and

(4) requiring the prosecution to respond to inquiries relating to its due diligence search for discoverable information as being without a factual basis.

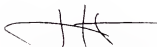


J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel

Enclosure

Prosecution Disclosure to the Court, dated 18 May 2012

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 24 May 2012.



J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel

) ) ) ) ) ) ) ) ) )

**V.**

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

## to Defense Motion to Compel Discovery #2

**Enclosure**

**24 May 2012**



UNITED STATES OF AMERICA )

v. )

Prosecution Disclosure  
to the Court

Manning, Bradley E. )

PFC, U.S. Army, )

HHC, U.S. Army Garrison, )

Joint Base Myer-Henderson Hall )

Fort Myer, Virginia 22211 )

18 May 2012

1. On 23 March 2012, the Court ordered the prosecution as follows:

a. The Government will immediately begin the process of producing the damage assessments that are outside the possession, custody, or control of military authorities IAW RCM 703(f)(4)(A). If necessary, the Government shall prepare an order for the Court to sign for each custodian.

b. The Government shall contact Department of State (DOS), Federal Bureau of Investigation (FBI), Defense Intelligence Agency (DIA), Office of the National Counterintelligence Executive (ONCIX), and Central Intelligence Agency (CIA) to determine whether these agencies contain any forensic results or investigative files relevant to this case. The Government will notify the court NLT 20 April 2012 whether any such files exist. If they do exist, the Government will examine them for evidence that is favorable to the accused and material to either guilt or punishment.

c. By 20 April 2012, the Government will notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classification under that agency's control.

d. By 18 May 2012, the Government will disclose any unclassified information from the 3 damage assessments that is favorable to the accused and material to guilt or punishment and provide any additional unclassified information from the damage assessments to the Court for *in camera* review IAW RCM 701(g)(2).

e. By 18 May 2012, the Government will identify what classified information from the 3 damage reports it found that was favorable to the accused and material to guilt or punishment. By 18 May 2012, the Government will disclose all classified information from the 3 damage assessments to the Court for *in camera* review IAW RCM 701(g)(2) or, at the request of the Government, *in camera* review for limited disclosure under MRE 505(g)(2).

f. By 18 May 2012, if the relevant Government agency claims a privilege under MRE 505(c) and the Government seeks an *in camera* proceeding under MRE 505(i), the Government will move for an *in camera* proceeding IAW MRE 505(i)(2) and (3) and provide notice to the Defense under MRE 505(i)(4)(A).

2. On 16 April 2012, the Court granted the Government's motion for leave of the Court to extend the time to respond from 20 April 2012 to 2 May 2012 as to whether the CIA will release classified information in original form, provide for limited disclosure under MRE 505(g)(2), or invoke the classified information privilege under MRE 505(c).

3. On 20 April 2012, the United States notified the Court of the following:

a. The prosecution contacted the DOS, FBI, CIA, DIA, and ONCIX to determine whether these agencies contain any forensic results or investigative files relevant to this case.

(1) **DOS.** DOS has forensic results and investigative files. The United States reviewed this information for evidence that is favorable to the accused and material to either guilt or punishment. Additionally, prior to the Court's order, the United States produced this information to the defense.

(2) **FBI.** FBI has forensic results and investigative files. The United States is reviewing this information for evidence that is favorable to the accused and material to either guilt or punishment. Additionally, prior to the Court's order, the United States started producing this information to the defense.

(3) **DIA.** DIA does not have any forensic results or investigative files.

(4) **ONCIX.** ONCIX does not have any forensic results or investigative files.

b. The United States anticipates that the **FBI** is the only government entity that is a custodian of classified forensic results or investigative files relevant to this case that will seek limited disclosure IAW MRE 505(g)(2).

4. On 2 May 2012, the United States notified the Court of the following:

a. The prosecution contacted the CIA to determine whether this agency contains any forensic results or investigative files relevant to this case.

**CIA.** The CIA has investigative files. The United States reviewed this information for evidence that is favorable to the accused and material to either guilt or punishment.

b. The United States anticipates that the **FBI** and **CIA** are the only government entities that are custodians of classified forensic results or investigative files relevant to this case that will seek limited disclosure IAW MRE 505(g)(2).

5. On 11 May 2012, the Court denied the Government's Motion to find the DOS Draft Damage Assessment not discoverable.

## 6. Forensic Results or Investigative Files.

a. **FBI.** The United States completed its review of the FBI investigative file for evidence that is favorable to the accused and material to either guilt or punishment.<sup>1</sup> On 16 March 2012, and immediately following the Court's issuing of the classified information protective order, the United States started voluntarily disclosing information from the FBI file, including information favorable to the accused and material to either guilt or punishment under MRE 505(g)(1). Except for twenty-two documents, as of the date of this response, the United States has voluntarily produced all information (unclassified or classified) under MRE 505(g)(1). The twenty-two remaining documents will be delivered to the defense on 21 May 2012 under MRE 505(g)(1).

b. **CIA.** The United States completed its review of the CIA forensic results or investigative files for evidence that is favorable to the accused and material to either guilt or punishment.<sup>2</sup> Any information (unclassified or classified) the prosecution identified will be voluntarily produced under MRE 505(g)(1) and delivered to the defense on 21 May 2012.

## 7. Damage Assessments.

a. **DOS.** The DOS provided the prosecution a copy of the draft DOS damage assessment to make available for the defense to inspect in a government facility under MRE 505(g)(1). *See* Enclosure. The copy does not contain redactions or summaries. The DOS authorizes only defense counsel and their security experts to inspect the document. The accused is not authorized to inspect or receive any information contained within the document. The prosecution requests the defense provide four duty days notice before each time they would like to inspect the document, so that the proper facility and government security expert may be made available.

b. **DIA.** The United States completed its review of the DIA Information Review Task Force (IRTF) Final Report for evidence that is favorable to the accused and material to either guilt or punishment. The United States also reviewed the document for information material to the preparation of the defense because DIA is an intelligence agency within the Department of Defense. Concurrent with this response, the United States is filing *ex parte* a Government *in camera* Motion for Authorization of a Substitution under MRE 505(g)(2). This motion directly responds to whether the United States identified any information that was favorable to the accused and material to guilt or punishment and includes a copy of the original damage assessment and an alternate version. Additionally, the motion outlines other equity holders outside of military authorities that request certain redactions or summaries of their information. If the Court authorizes the substitutions under MRE 505(g)(2), then DIA and other equity holders are not invoking the classified information privilege under MRE 505(c) and MRE 505(i), and the alternative copy of the Final Report will be made available to the defense for inspection

<sup>1</sup> The United States understands its continuing obligation to review the FBI forensic results or investigative files until this court-martial is complete.

<sup>2</sup> The United States understands its continuing obligation to review the CIA forensic results or investigative files until this court-martial is complete.

at DIA under MRE 505(g)(1) and MRE 505(g)(2). This alternative copy includes any unclassified information that is responsive to the Court's Order. DIA authorizes only defense counsel and their security experts to inspect the document at DIA, and requires the security experts to be present with defense counsel. The accused is not authorized to inspect or receive any information contained within the document.

c. **CIA.** The United States completed its review of the WikiLeaks Task Force report for evidence that is favorable to the accused and material to either guilt or punishment. The United States did not identify any unclassified information that was responsive to the Court's Order. Concurrent with this response, the United States is filing *ex parte* a Government *in camera* Motion for Authorization of a Substitution under MRE 505(g)(2). This motion directly responds to whether the United States identified any information that was favorable to the accused and material to guilt or punishment and includes a copy of the original report and an alternative version, if required. If the Court authorizes the substitutions under MRE 505(g)(2), the CIA is not invoking the classified information privilege under MRE 505(c) and MRE 505(i).

ASHDEN FEIN  
MAJ, JA  
Trial Counsel

Enclosure

Letter from DOS, dated 18 May 2012, without attachment (Sensitive but Unclassified without Attachment)



United States Department of State

*The Legal Adviser*

*Washington, D.C. 20520*

SECRET//NOFORN

(SENSITIVE BUT UNCLASSIFIED when separated from enclosure)

May 18, 2012

Major Ashden Fein  
Trial Counsel, Criminal Law Division  
Office of the Staff Judge Advocate  
Department of the Army

*Re: United States v. Private First Class Bradley E. Manning*

Dear Major Fein:

Enclosed please find a draft document entitled "WikiLeaks: Foreign Policy Impact of the Net-Centric Diplomacy Compromise" ("the draft"). The draft document is classified "Secret//Noform" (i.e., Secret and not to be shared with foreign nationals), and is the same as was provided under cover of our April 25, 2012 letter, except that we have now placed a watermark of the word "DRAFT" on each page of the draft document, whereas the previous version we provided only had this watermark on the cover page.

Pursuant to the Court's orders dated May 11, 2012 and March 23, 2012 in the above referenced matter, we are providing you this draft document to allow defense counsel to inspect the draft inside a government facility as part of classified discovery. Additionally, we authorize the defense Security Experts, referred to in paragraph 3(f) (page 3) of the Court's March 16, 2012 Protective Order for Classified Information, to inspect the draft, as required by them to perform their functions in this case. We do not authorize the defendant to inspect the draft, nor do we authorize defense counsel to convey the substance of classified information contained in the draft to the defendant.

SECRET//NOFORN

(Sensitive But Unclassified when separated from attachment)

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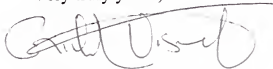
(Sensitive But Unclassified when separated from attachment)

- 2 -

We have not declassified the draft document, nor do we anticipate doing so within the timeframe that this case may proceed to trial. As such, the document remains classified "Secret//Noform" (i.e., Secret and not to be shared with foreign nationals). We understand that all defense counsel have a security clearance and have signed a Standard Form 312 Classified Information Nondisclosure Agreement (SF 312) and a protective order, and as such are bound to safeguard and handle the enclosed draft in accordance with Executive Order (EO) 13526 and the CAPCO standards, as well as the requirements reflected in SF 312 and the Court's protective order. We understand that defense counsel will be allowed to take notes; however, any notes of classified information will themselves be classified and will also be safeguarded and handled appropriately consistent with EO 13526 and the CAPCO standards, as well as the requirements reflected in SF 312 and the Court's protective order.

We do not object to this letter being shared with the Court or defense counsel.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard C. Visek", written over a horizontal line.

Richard C. Visek  
Deputy Legal Adviser

Enclosure: As stated

SECRET//NOFORN

(Sensitive But Unclassified when separated from attachment)

## UNITED STATES

V.

**MANNING, Bradley E., PFC**

U.S. Army, xxx-xx-

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE REPLY  
TO GOVERNMENT  
RESPONSE TO DEFENSE  
MOTION TO COMPEL  
DISCOVERY #2**

29 May 2012

1. In accordance with the Rules for Courts Martial (R.C.M.), 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the Headquarters Department of the Army (HQDA) file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6). See Attachment A to Defense Motion to Compel Discovery #2, dated 10 May 2012.

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the “relevant and necessary” standard under R.C.M. 703(f);

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

#### WITNESSES/EVIDENCE

2. The Defense would ask that this Court consider the Appellate Exhibits referenced herein, as well the attachment.

#### ARGUMENT

3. The Government continues to resist providing the Defense clearly relevant discovery. It continues to state that the Defense's requests "lack specificity" or that the Defense has not "provided a relevant basis for its requests." *See, e.g.* Government Response, p. 3. The Government's refrain is getting old. The Defense has provided the Government with a laundry list of relevant discovery that the Defense does not yet have and that it needs in order to try this case. And the Government responds in its typical nonsensical, smoke-and-mirrors fashion.

4. The Defense rests on the submissions in its Motion to Compel Discovery #2, but would like to specifically respond to certain issues raised by the Government.

#### **A. Defense Discovery Requests for Law Enforcement Files Specifically Identified by the Defense**

5. The Government acknowledges that the Defense has made requests for the following:

**Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff's Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;

**President's Intelligence Advisory Board.** Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;

**House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning. *See* Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII.



6. With respect to the Interagency Committee Review, the Government states that the “defense has failed to provide any basis for its request.” Government Response, p. 3. The authority, of which the Government should not need to be reminded, is *Brady*. Where the Defense makes a “discovery request[] that involve[s] a specified type of information within a specified entity” the Government has a due diligence obligation under R.C.M. 701(a)(6)/*Brady/Williams* to search for that information. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999). There is no indication that the Government has made any effort to search the files of Mr. Travers’ investigation.

7. With respect to the President’s Intelligence Advisory Board and the House of Representatives Oversight Committee, the Government maintains that it “has no knowledge of any such records, outside publicly made statements through press conferences or media organizations, equally accessible by the defense” and that “[t]he defense is invited to renew its request with more specificity and an adequate basis for its request.” Government Response, pp. 3-4. Again, the authority the Government is looking for is *Brady*. Moreover, the Government has resorted to its old tactics in saying it “has no knowledge of any such records.” *Id.* This argument is reminiscent of the Government’s statement that it was “unaware” of forensic results or investigative files relevant to this case maintained by DOS, FBI, DIA, ONIX and CIA. See Appellate Exhibit XVI. As the Court stated in its Ruling, “The Government has advised the Court it is ‘unaware’ of any forensic results or investigative files [maintained by the specified agencies]. The Government has a due diligence duty to determine whether such forensic results or investigative files that are germane to this case are maintained by these agencies.” See Appellate Exhibit XXXVI at p. 11.

8. Suspiciously, the Government states in footnote 4 that “the prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board under its ethical responsibilities.” Government Response, p. 4. First, the Defense request was made in October 2011, 7 months ago. Why is the Government “in the process of searching for discoverable information”? Why haven’t these files yet been searched? The Defense would venture to guess that the Government’s “diligent” search began when the Government received the Defense’s motion to Compel Discovery #2 on 10 May 2012. Second, the Government’s footnote is inconsistent with the position in its motion that the Defense has not provided a specific basis for discovery and that it has “no knowledge” of discoverable information. Which is it? Is the Government’s position that the Defense is entitled to *Brady* material from the Intelligence Advisory Board files, or that information from these files is not discoverable?

9. Further, the Government’s (footnote) concession that the Defense is entitled to *Brady* information from the Intelligence Advisory Board begs the question of why the Defense is also not entitled to *Brady* material from the other two specified sources (the Interagency Committee Review and House of Representatives Oversight Committee). It is not clear to the Defense what is so special about the Intelligence Advisory Board that the Government is searching those files for *Brady*, but not searching the other files.

**B. Files that the Government Does Not Dispute Are Within Military Possession, Custody and Control**

10. The Government states that the Defense is not entitled to certain files from DIA, DISA, CENTCOM and SOUTHCOM that are clearly within military possession, custody and control for two reasons – first, the defense failed to provide a specific request; and second, the defense failed to provide an adequate basis for why all such records are discoverable. Government Response, p. 6.

11. The Government laments that the Defense failed to provide specificity in its request. The Defense finds the Government's position almost laughable. At the past motions argument, the Defense raised with the Court the fact that the Government represented that DIA and ONCIX do not have any investigative files, all while producing to the Defense in discovery what the Defense would consider to be investigative files. See Appellate Exhibit LVI. The Government then went to great pains to specify that DIA and ONCIX did not technically have an "investigation" into the leaks, nor did they have a "damage assessment." This culminated in the Government submitting the Prosecution Brief Discussing Investigations and Damage Assessments where it sought to define the scope of what it means by "investigation" and what it means by "damage assessment." See Appellate Exhibit LXXII. According to the Government's Brief, "[i]nvestigations can be broken down into two categories: criminal and administrative. Criminal investigations are concerned with discovering evidence and finding the individual responsible for the crime. Administrative investigations encompass fact finding inquiries." *Id.*, p. 1. The Government stated that "damage assessments" as "multi-discipline, multi-agency, lengthy inquiries, consider the effects of compromised classified information to reach strategic opinions." *Id.* Apparently, the *Brady* material from ONCIX that the Government produced was neither an "investigation" nor a "damage assessment" according to the Government's arbitrary delineation of those terms. The Defense asked the Government *how* it should phrase a discovery request in order to obtain material similar to the ONCIX material (i.e. documents that deal with damage from the leaks that are neither "investigations" nor "damage assessments"). The Government indicated that, for whatever reason, the proper term was "working papers."<sup>1</sup>

12. Knowing that the Government would fabricate a definition of "working papers" that somehow avoided producing what the Government knows the Defense is asking for, the Defense requested: information "related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks (to include any document, report, analysis, file, investigation, letter, working

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<sup>1</sup> It is unclear why the Government believes that the term "working papers" captures what the Defense is seeking (i.e. reports, assessments, documents, emails, etc. that chronicle the harm, if any, from the alleged leaks). The term "working papers" suggests to the Defense that the relevant government agency is still working with the information in question. For instance, the Environmental Protection Agency recently wrote to the Government stating, "Approximately one year ago, after reviewing approximately 2400 documents, EPA determined that there were no EPA documents that were problematic and needed to be reported and provided to NCIX." See Attachment. Similarly, Human Health Services wrote that "HHS/OSSI reviewed about 6 thousand documents. We found that these documents did not reflect any damaging or derogatory comments related interactions with foreign counterparts/officials. Most of the documents pertained to personnel movements and scene setters for foreign trips." *Id.* Even though the Defense is seeking this type of information (i.e. information about whether the alleged leaks caused harm within different agencies of government), it does not believe that the emails from the EPA or HHS would qualify as a "working paper." Consequently, if the Defense had simply asked for "working papers" the Government would have responded that it did not have any discoverable material, as it has in the past.

paper, damage assessment (or anything that can be reasonably construed as falling within the aforementioned)).<sup>2</sup> Defense Motion, p. 4. The Defense included the term “working papers” to make it abundantly clear that the Defense is looking for information that might not meet the Government’s overly technical definition of “investigation” and “damage assessment.”

13. Ironically, when the Defense made a specific request for an “investigation” or a “damage assessment,” the Government responded that because these are terms of art for the Government, it did not have any responsive material. When the Defense broadened its request to capture more than the Government’s technical (and self-imposed) definitions, the Government complained that the request was “too broad.” The Defense is not clear on what magic language the Government would like for the Defense to use to convey what everybody understands the Defense is looking for.<sup>3</sup> According to the Government, the Defense’s previous requests were “too narrow” and now they are “too broad.” The Defense believes that no Defense discovery request would ever be “just right” to satisfy Goldilocks.

14. Moreover, the Government cannot even keep track of its own definitions. In its Response, it indicates that it has disclosed “twenty-seven damage assessments ... [and] has retrieved eight additional assessments.” Government Response, p. 16. The Government is clearly not referring to “damage assessments” but rather to what it would term “working papers” (e.g. reports from departments such as the Department of Housing, the National Archives, etc. regarding the impact of the leaks). By morphing, distorting and constantly changing definitions, the Government is trying to “define” itself out of producing relevant discovery. It cannot be permitted to do this.

15. The Government then complains that the Defense has failed to provide an adequate basis for discovery. The Government states that “[r]equesting all records, without limitation, does not demonstrate ‘an adequate theory of relevance’ to justify the compelled discovery.” Government Response, p. 7. The Government, again in a throwaway footnote, states that it “estimates that all such records would consist of more than 250,000 pages.” Government Response, p. 7. So the Government is saying that there are 250,000 pages in its possession, custody and control that relate to the accused, WikiLeaks and/or the damage occasioned by the leaks that it has not produced to the Defense? And that possibly it has not searched for *Brady*? If so, this is very disconcerting to the Defense.

16. The Government also states that “the prosecution agrees that some portions of the remedial process may be discoverable under RCM 701(a)(6), *Brady*, or if the defense can demonstrate an adequate theory of relevance (e.g. portions relevant to the charged offenses).” Government Response, p. 8. The Defense is not clear on what the Government is saying. Is there material within DIA, DISA, CENTCOM and SOUTHCOM that relates to the remedial process that the Government has not disclosed? If not, why not? The Defense is also not clear on what the Government means in its parenthetical – “e.g. portions relevant to the charged offenses.” Government Response, p. 8. How can the Defense identify the “portions” of the remedial measures when it has not seen them? In short, the Defense has already explained numerous times why remedial measures are relevant to the charged offenses and/or sentencing. It is not a

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<sup>2</sup> The Government says in footnote 7 that “[o]nly damage assessments and working papers, related to a damage assessment, have been specifically requested by the defense.” The Defense does not understand what this means.

<sup>3</sup> Apparently, the Government is able to clearly understand its own formulation of the discovery request to HQDA. That information is exactly what the Defense is looking for as well.

large logical leap to conclude that if the remedial measures were fairly insignificant, this would be favorable for sentencing; conversely, if the remedial measures were fairly significant, this would not be as favorable for sentencing. As such, the Defense cannot understand why the Government does not see the very obvious relevance of the remedial measures contained in documents within its possession, custody and control.

17. The Government opposes producing to the Defense the results of the (delayed) HQDA memo. It states that:

The prosecution recently received the HQDA records and has been reviewing the records for information discoverable under RCM 701(a)(6) and Brady under its ethical obligations. The prosecution will provide all information within the HQDA records that is discoverable under RCM 701(a)(6) and Brady.  
Government Response, p. 8.

The Government believes, however, that such records are not discoverable under R.C.M. 701(a)(2) because “defense has neither put the prosecution on notice of what the defense desires nor provided an adequate basis for why all information are [sic] ‘material to the preparation of the defense.’” *Id.* The Government’s first reason for not producing these records makes no sense. The Government asserts that the “defense has [not] put the prosecution on notice of what the defense desires.” The Defense “desires” the documents responsive to the HQDA request.<sup>4</sup> The Government’s second reason is equally disingenuous – that the Defense has not provided an adequate basis for why all information is material to the preparation of the Defense.<sup>5</sup>

18. If one even cursorily examines the Government’s request, it is abundantly clear why all of this information would be material to the preparation of the Defense. The Government requested the following:

... any documents or files with material pertaining to: any type of investigation; working groups; resources provided to aid in rectifying an alleged compromise of government [sic.] information; damage assessments of the alleged compromise; or the consideration of any remedial measures in response to the alleged activities of PFC Manning and Wikileaks. *See* Attachment A to Defense Motion to Compel Discovery #2, dated 10 May 2012.

The Government’s assertion that the Defense has not sufficiently proffered why damage assessments, remedial measures, and investigations into the leaks is relevant is like the Government making the Defense articulate why the CID file is material to the preparation of the Defense. It is so plainly self-evident from the documents requested why they would be relevant for the Defense that the Government simply looks like it is hiding something by refusing to turn them over pursuant to R.C.M. 701(a)(2).

<sup>4</sup> At footnote 10, the Government maintains that all this information is not in a specific “file” (it then proceeds to define “file” for the Defense’s edification). The Government knows exactly what the Defense is seeking – the documents that were sent to HDQA in response to this Memo. An instruction on the word “file” is not necessary.

<sup>5</sup> The Government apparently concedes that “the standard of materiality [relating to RCM 701(a)(2)] is not a high one.” Government Response, p. 11.

**C. Files of Joint Investigative Agencies and Agencies that Are Closely Aligned with the Government**

19. As argued in the Defense's Motion to Compel Discovery #2 and in Appellate Exhibit LXVIII, the Government is misunderstanding what term needs interpreting in R.C.M. 701(a)(2). It is not the term "military authorities" that needs interpreting; rather it is the term "possession, custody and control" that needs interpreting.<sup>6</sup> The Defense largely rests on its previous submissions in this respect. The Defense, however, would like to clarify several points with respect to the Government's argument that the documents requested by the Defense are not within the possession, custody and control of military authorities under R.C.M. 701(a)(2).

20. First, the Government has very conveniently set up a straw man when it says that the Defense defines "military authorities" to include "the United States Government." Government Motion, p. 10. That is not the Defense's argument. The Defense does not believe that the Government, under R.C.M. 701(a)(2) needs to search the files of the "United States Government." The Defense's position is that the trial counsel's obligations to disclose information to the Defense pursuant to R.C.M. 701(a)(2) extend to those documents of closely aligned and jointly investigating agencies because such documents are within his possession, custody and control.

21. Second, the Government maintains that "[e]xtending the definition of 'military authorities' beyond military commands or organizations subject to military control would carry drastic implications:

Subjecting the files of all closely aligned organizations, under Williams, to open inspection, if "material to the preparation of the defense," would result in a new graymail tactic, a "problem" in discovery practice. See, e.g., MRE 505, analysis; see also AE LIII at 4 (the defense previously highlighted that "the standard of materiality [relating to RCM 701(a)(2)] is not a high one"). Here, such a tactic would lead to nearly insurmountable consequences. For example, if an inspection of all FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX classified records "material to the preparation of the defense" is allowed, assuming such exist, the defense could flood the Court with MRE 505 procedures, stall the criminal proceeding, and, if the privilege under MRE 505 is invoked in light of national security concerns, inundate those agencies with classification reviews. See RCM 102(b). Government Response, p. 12.

22. The Government's argument overlooks the fact that, in federal courts across the country, judges have uniformly accepted the interpretation advanced by the Defense. The judicial system is not in shambles; the "drastic implications" cited by the Government have not come to fruition; there has not been widespread "graymailing" of the United States Government; the consequences have not been "nearly insurmountable" in federal court. The Government's overreaction to a very well-established federal rule again suggests that there is something that the Government is trying to hide by not turning over documents of closely aligned agencies and agencies that participated in a joint investigation.

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<sup>6</sup> The Defense assumes that the second reference to the Defense's interpretation of R.C.M. 701(a)(2) on p. 10 (middle of the page) is simply a typo.

23. Third, the Government states that it does not have “both access to, and knowledge of” all records of jointly aligned agencies or agencies that participated in a joint investigation. Government Response, p. 13 (emphasis in original). It appears that the Government is saying that it does not have “access to” the files because “the prosecution has only limited access to the requested records” and has “no authority to remove the documents from the agencies’ hands.” *Id.* It further states that in the event that the prosecution does not have the authority to disclose certain information, then the prosecution “does not, and cannot, have access to the information for discovery purposes.” *Id.* at p. 14. The Government is confusing “access” with “authority to disclose.” Access simply means the right to look at, inspect or get to the information in question. Access does not necessarily imply that the accessor has the right to give or disclose the information in question. For instance, the Defense has access to classified discovery in this case. However, the Defense does not have the authority to disclose that information publicly. Thus, “access” addresses only the question of whether the Government has had the right or ability to see, inspect, examine, look at, etc. the information in question. It does not address the question of whether the Government is permitted to disclose that information. If the Government’s interpretation were accepted, it would gut the “possession, custody and control” analysis in Federal Rule 16. All information that is not in the physical possession, custody or control of the trial counsel will be “owned” by, to use the Government’s expression, other equity holders. Thus, all the trial counsel would need to do is say that while it has the ability to see, observe or examine the material in question, it does not have permission to disclose it. Such is the functional equivalent of leaving evidence to “repose” in the hands of another agency, as discussed in *Trevino*. See *United States v. Trevino*, 556 F.2d 1265, 1272 (5<sup>th</sup> Cir. 1977). Finally, the Court’s ruling contemplates that evidence may be discoverable under R.C.M. 701(a)(2) as being within the custody, possession, and control of military authorities, but that the Government might not have permission to disclose that information, thus necessitating resort to R.C.M. 703. See Appellate Exhibit LXVIII (“[T]he fact that information controlled by another agency is discoverable under RCM 701 may make such information relevant and necessary under RCM 703 for discovery.”).

24. Finally, the Government argues that if such documents are determined to be in the possession, custody or control of military authorities for the purposes of R.C.M. 701(a)(2), that it specifically objects to producing the following: (1) any Government Agency forensic results or investigative files and any damage assessment; (2) any documents relating to the Chiefs of Mission review, the WikiLeaks Working Group, the “Mitigation Team,” and the DoS’s reporting to Congress in December 2010; and (3) DSS files or investigations dealing with Specification 12 or 13 of Charge II. Government Response, p. 14. The Government argues that the Defense has failed to “provide specificity or an adequate basis for its request.” *Id.* The Defense’s request with respect to these documents was very specific and the “basis” for the request has been articulated many times (and, in any event, is self-evident from the nature of the documents requested).

### CONCLUSION

25. Pursuant to the Defense’s Motion to Compel Discovery #2 and this Reply Motion, the Defense respectfully requests that this Court compel the requested discovery and that this Court

order the Government to provide an accounting in respect of its *Brady* obligations pursuant to the Court's inherent authority under R.C.M. 102, 701(g)(3)(D), and 801(a)(3).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Coombs', with a stylized flourish at the end.

DAVID EDWARD COOMBS  
Civilian Defense Counsel

# ATTACHMENT



**Fein, Ashden CPT USA JFHQ-NCR/MDW SJA**

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**From:** [REDACTED]  
**Sent:** Friday, February 17, 2012 8:34 AM  
**To:** Fein, Ashden CPT USA JFHQ-NCR/MDW SJA  
**Subject:** Courts Martial: Private Bradley Manning

CLASSIFICATION: UNCLASSIFIED CAVEATS: FOUO TERMS: NONE

Ashden - SGT Princeton Bradley contacted us on 16 February 2012 regarding the referenced matter. SGT Bradley requested information regarding documents previously forward to us by ONCIX. The following are relevant facts as we know them:

1. On 27 October 2010, we received a disc from ONCIX containing 726 documents. ONCIX requested that we review the documents to determine whether they were US Department of Education documents.
2. When ONCIX provided the documents, they told us that they were identified as potentially belonging to the US Department of Education through application of the search terms "DOE" and "education" to their document collection.
3. We subsequently reviewed all documents provided by ONCIX.
4. We determined that none of the documents were US Department of Education documents and we informed ONCIX accordingly.

**Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA**

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**From:** [REDACTED]  
**Sent:** Friday, March 02, 2012 12:54 PM  
**To:** Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA  
**Cc:** [REDACTED]  
**Subject:** Re: Request to Review NCIX Response (UNCLASSIFIED)

Sergeant Bradley:

EPA has no documents to provide to the Department of the Army, per your request, below.

Approximately one year ago, after reviewing approximately 2400 documents, EPA determined that there were no EPA documents that were problematic and needed to be reported and provided to NCIX. EPA informed this to NCIX in an informal, oral communication.

[REDACTED]

**From:** "Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA"  
<Princeton.Bradley@irhcnr.martosm.mil>  
**To:** [REDACTED]  
**Cc:** [REDACTED]  
**Date:** 02/27/2012 04:52 PM  
**Subject:** Request to Review NCIX Response (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: FOUO

Ma'am,

Good afternoon, I hope that you are well. I am a paralegal for the prosecution team in the Court-Martial of Private First Class Bradley Manning in connection with "W@kileaks." The purpose of this email is to request a copy of all documents that your organization provided to NCIX approximately one year ago. Although we have been coordinating with NCIX/ODNI for the past year, just two weeks ago they determined that we cannot review copies of your organization's documents in their possession, and we must directly go to your organization to coordinate a review.

We are requesting this information to determine if there is any information that may be discoverable and may require production by the government. None of the information will leave our office, unless your organization has approved its release, and it will remain classified at all times.

We would like to review the documents from your organization as soon as possible. This short suspense is necessary as the accused was arraigned last week, and to allow for enough time to coordinate with your organization, if information is discoverable. If the information is classified, please feel free to use the lead prosecutor's SIPRNET and JWICS email addresses below to transmit your documents. If you would like to speak with me, please call at 202-685-1975 and if you would like to speak with our lead prosecutor, please call Captain Ashden Fein at 202-685-4572.

SIPRNET: ashden.fein@fhqncr.northcom.smil.mil

JWICS: ashden.fein@dodils.ir.gov

Thank you.

Very Respectfully,  
Princeton Bradley  
Sergeant, U.S. Army  
Paralegal Non-Commissioned Officer  
Military Justice, OSJA  
Fort McNair  
202-685-4489 / 1975  
princeton.bradley@fhqncr.northcom.sil

Classification: UNCLASSIFIED

Caveats: FOUO

**Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA**

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**From:** [REDACTED]  
**Sent:** Wednesday, March 07, 2012 11:45 AM  
**To:** Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Request to Review NCIX Response (UNCLASSIFIED)

"I have contacted you on behalf of the prosecuting attorneys to request a point of contact in your General Counsel's Office with regard to the documents your organization sent to the NCIX regarding the "W#kileaks" incident. Those documents, should they be deemed relevant and necessary, would be used in the U.S. Army Court Martial of PFC Bradley Manning, but only with the permission of your agency."

Sergeant Bradley,

I believe I know what you are referring to. Shortly after the "W#kileaks" incident, I was contacted by NCIX and given a briefing. They said they had done a word search (the words being "Postal", "Inspection", and "Service") of the released records and found three pertaining to the Postal Inspection Service. They provided me with a CD containing the reports and asked me to review them and advise if we had been compromised in any way. The Postal Service does not have original classification authority, so I was somewhat surprised that they had found anything pertaining to us. I reviewed the documents and they were all the same document. It was a summary of activities compiled by another agency. I don't know why it was classified. It mentioned a visit to a U.S. Attorney's Office and listed what agencies were present. One was the Postal Inspection Service. The information was meaningless. I either phoned or emailed the NCIX contact and advised him of this. I did not send any documents to the NCIX ("with regard to the documents your organization sent to the NCIX").

Please advise if you need anything further.

[REDACTED]

---

**From:** Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA  
[mailto:Princeton.Bradley@jfhqncr.northcom.mil]  
**Sent:** Tuesday, March 06, 2012 6:16 PM


**Subject:** Re: Request to Review NCIX Response (UNCLASSIFIED)

Sir,

Unfortunately, I personally do not have JWICS access. Our lead prosecutor Captain Ashden Fein however has both JWICS and SIPRNET access. I have provided those email addresses below. However, I would like to add that although we work in a secured environment, CPT Fein does not currently have JWICS access at his desk and must go to our SCIF in order to reply to your emails. If you require any additional information please feel free to contact me.

JWICS - ashden.fein@dodis.ic.gov  
SIPRNET - ashden.fein@jfhqncr.northcom.smil.mil

Very Respectfully,  
Sergeant Princeton Bradley  
OSJA, Military Justice  
Fort McNair, Bldg 32  
202-685-1975  
princeton.bradley@jfhqncr.northcom.mil



Sir,


Do you have a JWICS email address that I may respond to?

Thank you



---

From: Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA  
[mailto:Princeton.Bradley@jfhqncr.northcom.mil]  
Sent: Tuesday, March 06, 2012 5:15 PM



Subject: Request to Review NCIX Response (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: FOUO

Sir,

Good afternoon, I hope that you are doing well. I am sending you this email to confirm that I am in fact SGT Princeton Bradley and that I left the voice message on your answering machine on the 29th of February. I apologize for the lapse in communication, I have been out of the office since last Friday. I would also take this opportunity to elaborate on the request I mentioned in my message.

As you may recall, I am currently a paralegal for the prosecution team in the U.S. Army Court-Martial of Private First Class Bradley Manning in connection to "W#kileaks." I have contacted you on behalf of the prosecuting attorneys to request a point of contact in your General Counsel's Office with regard to the documents your organization sent to the NCIX regarding the "W#kileaks" incident. Those documents, should they be deemed relevant and

necessary, would be used in the U.S. Army Court Martial of PFC Bradley Manning, but only with the permission of your agency.

These documents will remain classified at all times, and will only be used, if at all, within the guidelines given by your General Counsel's Office. This being said, the prosecuting attorneys need to coordinate with your OGC department to establish those guidelines and ensure proper use of those documents. If at all possible, please send both SIPRNET and JWICS email addresses, as well as phone numbers, for the points of contact that you are able to obtain. Also, I would stress that because the accused was arraigned as of the 23rd of February, the prosecution team is in need of this information as soon as possible. Thank you very much for your assistance in this matter and please contact me if you have any questions or concerns.

Very Respectfully,

SGT Princeton Bradley

Paralegal Non-Commissioned Officer

Military Justice, OSJA

Fort McNair, Bldg 32

202-685-4489 / 1975

princeton.bradley@jfhqncr.northcom.mil

Classification: UNCLASSIFIED  
Caveats: FOUO

**Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA**

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**From:** Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA  
**Sent:** Thursday, April 19, 2012 9:12 AM  
**To:** Bradley, Princeton L. SGT USA JFHQ-NCR/MDW SJA  
**Subject:** FW: US v. Manning (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Human Health Services - please process

-----Original Message-----

Sent: Thursday, April 19, 2012 8:54 AM  
To: Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA  
Subject: RE: US v. Manning (UNCLASSIFIED)


HHS/OSSI reviewed about 6 thousand documents. We found that these documents did not reflect any damaging or derogatory comments related interactions with foreign counter parts/officials. Most of the documents pertained to personnel movements and scene setters for foreign trips.

Let me know if you need any more info

Thanks

This email contains information that is SENSITIVE BUT UNCLASSIFIED (SBU) and is intended FOR OFFICIAL USE ONLY. The email or its attachments should not be disseminated, distributed, or copied to persons not authorized to receive such information. The contents of this email are not intended for public release. Please contact the originator prior to sharing this

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Classification: UNCLASSIFIED

Caveats: NONE

Sir,

Thank you for speaking with me earlier today. Here is my contact information for the requested material. Please let me know if your department requires anything additional from our office or if you have any further questions about what we are requesting.

v/r

J. Hunter Whyte

CPT, JA

Trial Counsel

United States Army Military District of Washington

Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED

Caveats: NONE



**Fein Ashden CAPT NORTHCOM USA Military**

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**From:** [REDACTED]  
**Sent:** Thursday, March 22, 2012 9:31 AM  
**To:** Fein Ashden CAPT NORTHCOM USA Military  
**Cc:** [REDACTED]  
**Subject:** Responses from the Department of Veterans Affairs to Wiki Leaks questions

CLASSIFICATION: UNCLASSIFIED

CAVEATS: FOUO

TERMS: NONE

Good morning Sgt. Princeton Bradley,

My name is [REDACTED] a Security Specialist here at the Department of Veterans Affairs I work with [REDACTED] who is the SSO. [REDACTED] is on leave and she wanted me to send you the answers to the Wiki Leaks questions from the Department of Veterans Affairs. The answers to the Wiki Leaks questions are below:

**Answers:**

1. There were no additional documents found in addition to those provided by IRTF.
2. Veterans Affairs (VA) does not have classification authority, therefore, none of the documents were originated by VA. CONFIDENTIAL was the highest classification level referencing VA documents.
3. In the event of a public release of the documents, there will no impact on the VA. VA does not collect intelligence; therefore, no revelation of sources and method and no impact on going or future agency activities.
4. There will be no impact on VA's ability to fulfill its mission.
5. There is no impact; therefore, no plan to mitigate.
6. There is no financial impact; therefore, no planned mitigation efforts.
7. There are no other issues.

Respectfully,

[REDACTED]

CLASSIFICATION: UNCLASSIFIED

CAVEATS: FOUO

TERMS: NONE

**Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA**

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**From:** [REDACTED]  
**Sent:** Thursday, May 03, 2012 4:32 PM  
**To:** Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA  
**Subject:** SEC WL Declaration

UNCLASSIFIED

Captain White:

In mid-October 2010, the United States Securities and Exchange Commission (SEC) received a request from NCIX to conduct a review of certain documents relevant to a national security matter. The agency reviewed a total of 1,497 separate documents created between 2004 and mid-2010. The SEC review indicated that this agency did not suffer any damage or impact resulting from the compromise of those documents.

We communicated our findings verbally to NCIX in the February/March 2011 timeframe. In May/June 2011 timeframe, we also talked with NARA – Information Security Oversight Office (ISOO) as to the review and results.



IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC  
U.S. Army, xxx-xx-  
Headquarters and Headquarters Company, U.S.  
Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

**SUPPLEMENT TO  
DEFENSE MOTION TO  
COMPEL DISCOVERY #2**

30 May 2012

ADDITIONAL FACTS

1. On 30 May 2012, the Government requested a telephonic 802 conference in order to, *inter alia*, clarify the scope of the Court's 29 May Ruling ordering the Government to produce a witness from the State Department to testify at the 6-8 June 2012 motions argument.
2. During the call, the Government requested clarification as to what the Defense would be asking the State Department witness, so as to ensure that the right witness was provided and so that, if necessary, protective measures could be put in place to safeguard classified information. The Defense stated that it would ask the Department of State witness questions about whether documents exist within the Department of State with respect to the following:
  - (a) The Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the overall effect that the WikiLeaks release could have on relations within their host country, if any;
  - (b) The WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;
  - (c) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any; AND
  - (d) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010.

See Defense Motion to Compel Discovery #2 at p. 8, 11-12. For instance, it would ask the Department of State witness whether the WikiLeaks Working Group was actually created; if so, whether they had any documentation and in what form; and whether any of this material is already contained within the damage assessment provided by the Department of State.

3. The Government expressed confusion about producing the witness. MAJ Fein stated that it seemed like the Defense was asking for what material might be found within the Department of State. If so, the proper way to do this is not through a witness, but through a proper discovery request. The Defense was absolutely baffled by MAJ Fein's statement.<sup>1</sup> The Defense has made previous discovery requests for this information, but the Government has prevaricated on whether it even existed. More importantly, the request for this information was most recently made in the Defense Motion to Compel Discovery #2. To now suggest that the Defense has not *asked* for this information is preposterous.

4. When the Defense and the Court pointed out that the Defense had repeatedly asked for this information, the Government switched its tune, almost pretending that it had not made the crazy statement to the effect that if the Defense wanted this information, it should have asked for it.

5. The Government's new argument was that it does not dispute that the things referenced above actually happened (i.e. the Government would stipulate that a Working Group, Mitigation Team, etc. were constituted), but instead disputes whether the Defense is entitled to these documents. That is, the Government conceded that documents from (1)-(4) exist, but maintained that the Defense had not stated an adequate basis for discovery and thus was engaging in a "fishing expedition." Thus, it was not entitled to these documents under R.C.M. 701(a)(6) or 701(a)(2).

6. The Defense asked whether the Government had seen the requested documents. The Government admitted that it was still working to get these documents and had not reviewed them. Its first priority was getting the damage assessment from the Department of State; these other documents had lower priority. The Defense expressed its disbelief that discovery requests were made for these documents in 2011, and the Government had not obtained (much less reviewed) the documents when the trial is scheduled for a mere few months from now. The Defense also asked the Government how it could claim that these documents were not discoverable when it had not yet reviewed them. The Government did not provide a response.

7. The Court ultimately ordered the Government to produce a witness from the Department of State and directed that the Defense's questioning be limited to what documents, if any, existed within the Department of State.<sup>2</sup> The Court also ordered the Government to put together a list of all the evidence (both documentary and testimonial) that it intended to introduce in aggravation. Because some of the evidence might be classified, the Court permitted the Government to propose a workable format for this list.

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<sup>1</sup> The Court also indicated repeatedly that it was confused by MAJ Fein's statement.

<sup>2</sup> In light of the new information learned by the Defense, the Defense indicated that it would also like to question the witness about *when* the Government asked for (1)-(4) from the Department of State. The Court was of the view that this was a question for the Government and not for the Department of State.

## ARGUMENT

8. In its Motion to Compel Discovery #2, the Defense asked for the Court to order the Government to prepare a “due diligence” statement explaining the steps it has taken in its *Brady* search. In that motion, the Defense explained the reasons why it was imperative that the Government be held to account for its *Brady* search. In particular, the Defense referenced a 17 April 2012 memo from HQDA which revealed that the Government had not yet conducted a *Brady* search of its own files. The memo showed that the Government sent an original request out in July 2011, but that the Government did not realize that the request had not been acted upon until nearly nine months later. This utter lack of diligence in searching its own files does not inspire confidence that the Government is diligently searching files of closely aligned agencies.

9. The Defense has now learned of new information that supports the Defense’s argument that the Court should order the Government to prepare a “due diligence” statement. The Government has not conducted a search of files within the Department of State, an agency that is “closely aligned” with the Government within the meaning of *Williams*. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). Under *Williams*, a prosecutor must search:

- (1) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (2) investigative files in a related case maintained by an entity closely aligned with the prosecution; and
- (3) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. [citations omitted].

The Defense submits that the Government has a *Brady* obligation to search files from the State Department both under the second and the third prong of *Williams*.

10. The Government appears to be saying that it needs some authority or proffer or relevance, above and beyond *Brady/Williams*, in order to conduct this search. This position is troubling. The Defense made a “discovery request[] that involved a specified type of information within a specified entity” for items (1)-(4), referenced above. At this point, the Government’s *Brady/Williams* obligations kick in and the Defense does not need to proffer any further basis for the Government. The relevance of the documents requested is so self-evident (harm, mitigation, risk to individuals, etc.) that the Government’s position that the Defense had not stated an adequate basis for these documents is disheartening.

11. Even if the Defense had not made a specific request (which is clearly did), the Government would still have an obligation to search the Department of State files. The Government recognizes this in its Response Motion where it states, “The prosecution shall, and will, disclose *Brady* and RCM 701(a)(6) material even in the absence of a defense request.” Government Response Motion, p. 16. Despite apparently being aware of the relevant law, the Government still does not understand what it is doing.

12. The Defense had assumed that since the Court set the Government straight in its 23 March 2012 Ruling, the Government was (albeit belatedly) following-through on its *Brady* obligations. The more the Defense learns – either through accident or through conversations involving

tangentially-related matters – the more it is apparent that the Government still does not have a handle on *Brady* and discovery in general.

13. To date, the Defense has received very little *Brady* material. The Government assures the Defense that more is forthcoming. See Government Response, p. 16. R.C.M. 701(a)(6) requires the Government to provide *Brady* material “as soon as practicable.” Most of the *Brady* material provided thus far (with the exception of the damage assessments) is unclassified. It is unclear why unclassified *Brady* material was not provided earlier, and why the Defense is still waiting for the bulk of *Brady* discovery. The Government has had over two years to perform a *Brady* search. It can hardly be said that providing *Brady* to the Defense two years into the case (and less than three months before trial) qualifies under R.C.M. 701(a)(6) as “as soon as practicable.” The Defense believes that the Government is either willfully blind to its discovery obligations or that it is dragging out the process to obtain a tactical advantage. Neither can be tolerated.

14. Further, there are big question marks on whether the Government has searched for *Brady* in all the relevant files. Based on: a) the HQDA Memo; b) the Government’s admission about not even starting the Department of State search; and c) *Brady* information being provided to the Defense in dribs and drabs, it is safe to assume that the Government is missing the mark on its *Brady* obligations, despite its protestations to the contrary.

15. At this juncture, there are serious *Brady* questions regarding the following agencies or organizations:

- a) Interagency Committee Review – the Government does not appear to have conducted a *Brady* search
- b) the President’s Intelligence Advisory Board – the Government states that it is in the process of searching for *Brady* (Government Response, p. 4).
- c) the House of Representatives Oversight Committee - the Government does not appear to have conducted a *Brady* search
- d) the Chiefs of Mission review – the Government has not conducted a *Brady* search
- e) the WikiLeaks Working Group - the Government has not conducted a *Brady* search
- f) the “Mitigation Team” created by the Department of State - the Government has not conducted a *Brady* search
- g) the Department of State’s reporting to Congress - the Government has not conducted a *Brady* search
- h) DIA – it is unclear whether the Government has conducted a *Brady* search
- i) DISA - it is unclear whether the Government has conducted a *Brady* search
- j) CENTCOM and SOUTHCOM - it is unclear whether the Government has conducted a *Brady* search
- k) April 2012 HQDA Memo – the Government is currently in the process of conducting a *Brady* search
- l) FBI – the Government claims to have produced all *Brady* from the grand jury testimony; the Government claims to have produced “at least *Brady*” in the remaining portions of the FBI file it has produced, but it is unclear whether the Government has actually completed its *Brady* search of other FBI files
- m) DSS - it is unclear whether the Government has conducted a *Brady* search

- n) DOS – the Government does not appear to have conducted a *Brady* search (since its first priority was simply getting the Court the damage assessment).
- o) DOJ - it is unclear whether the Government has conducted a *Brady* search
- p) Government Agency - it is unclear whether the Government has conducted a *Brady* search
- q) ODNI - it is unclear whether the Government has conducted a *Brady* search
- r) ONCIX – the Government is currently in the process of conducting a *Brady* search
- s) 63 agencies and other organizations the Government has claimed to have contacted – the Government represented that it *already* searched the 63 agencies and that none of these agencies had *Brady* material; apparently, it is now re-searching these files under the correct *Brady* standard.

16. Not only has the Defense not yet received *Brady* material from all of these organizations, but it seems that the Government has not even contacted some of these organizations. *See e.g.* Government Response, p. 3-4 (stating that the prosecution is in the process of searching for discoverable information from the Intelligence Advisory Board; but resisting searching for *Brady* material from the Interagency Committee Review and the House of Representatives Oversight Committee).

17. At a certain point, we can no longer believe the Government when they say they know what they are doing and they are working “diligently.” This is simply not the case. The HQDA Memo and the fact that they have not reviewed key Department of State files prove otherwise. As such, the Government should be directed to account for the steps that it has taken in fulfilling its *Brady* obligations, as discussed in the Defense’s Motion to Compel Discovery #2.

Respectfully submitted,



DAVID EDWARD COOMBS  
Civilian Defense Counsel

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211 )

**Prosecution Response to  
Supplement to Defense Motion to  
Compel Discovery #2**

**31 May 2012**

The prosecution respectfully requests the Court deny the defense's request that the prosecution account for the steps that it has taken in fulfilling its Brady obligations for the reasons provided in the Prosecution Response to Defense Motion to Compel Discovery #2. The prosecution responds to the Supplement to Defense Motion to Compel Discovery #2 (hereinafter the "Supplement") as follows.

**FACTS**

The prosecution agrees with, disputes, and supplements those facts alleged in the Supplement as follows.

On 29 May 2012, the Court ordered the prosecution to have a Department of State witness with knowledge of damage assessments available to testify for the 6-8 June 2012 Article 39(a) session. The Court stated that the witness need not be Ambassador Kennedy.

On 29 May 2012, the prosecution requested that the Court clarify what type of information the Court intended to elicit from the DoS witness and whether the inquiry would focus specifically on the DoS. The Court responded that the purpose of the DoS witness is to address the question by the defense, specifically whether the draft damage assessment is the last damage assessment by the DoS.

The prosecution agrees with paragraph 1 of the Supplement that, on 30 May 2012, the prosecution requested a telephonic Rule for Courts-Martial (RCM) 802 conference to clarify, *inter alia*, the scope of the DoS witness' testimony.

The prosecution agrees with paragraph 2 of the Supplement insofar as the defense stated it would ask the DoS witness a series of questions about the existence of the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DoS reporting to Congress, and whether such records are part of the most recent DoS damage assessment. The defense stated that its questions would elicit a "yes" or "no" response.<sup>1</sup> The prosecution offered to stipulate to the existence of the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DoS reporting to Congress, as referenced in Under Secretary for Management Patrick Kennedy's testimony on 10 March 2011. The defense declined.

<sup>1</sup> The Supplement itself confirms the defense's ultimate objective in questioning the DoS witness where the defense proffers that it will ask the witness "in what form" any documents are in; namely, to later formulate discovery requests. See Supplement, at 2.



The defense also stated that it would ask the DoS witness whether, and when, the prosecution contacted the DoS to conduct its review of any relevant records. The Court stated that the witness would not be required to testify to whether and when the prosecution contacted the DoS.

The prosecution opposed the scope of the defense's proffered examination of the DoS witness as being a fishing expedition to undercover intra- and inter-agency workings to develop future discovery requests.

The prosecution disputes paragraphs 3-4 of the Supplement. The prosecution has never denied, or questioned, the existence of the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DoS reporting to Congress. In fact, until recently, the defense had not requested any information from, yet alone reference, the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, or the DoS reporting to Congress.<sup>2</sup> Neither the pre-referral discovery requests nor the Defense Motion to Compel Discovery makes such a request.

On 10 May 2012, the defense requested "any documents related to" the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, or the DoS reporting to Congress in discovery under RCM 701(a)(2) or, in the alternative, in production under RCM 703. See Defense Motion to Compel Discovery #2 (hereinafter "Discovery #2"). On 24 May 2012, the prosecution requested that the Court deny the discovery under RCM 701(a)(2) or production under RCM 703 of any such documents "for failure to provide specificity or an adequate basis for its request." Prosecution Response to Discovery #2. The prosecution reasons that requesting "any documents" is not a specific request and that the defense is required to articulate why requested information is discoverable or subject to production under RCM 701(a)(2) or RCM 703.

The prosecution disputes paragraph 5 of the Supplement. Again, the prosecution consistently has denied discovery under RCM 701(a)(2) or production under RCM 703 of "any documents related to" the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, or the DoS reporting to Congress "for failure to provide specificity or an adequate basis for its request." Id. The prosecution has never stated that the defense is not entitled to any information discoverable under RCM 701(a)(6), and has consistently stated that the prosecution intends to review all documents for Brady and RCM 701(a)(6) material that is provided by the DoS that are responsive. See Prosecution Response to Discovery #2; see also AE XLIX, at 2.

The prosecution disputes paragraph 6 of the Supplement insofar as the defense stated that it made discovery requests for the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, or the DoS reporting to Congress in 2011 and that the prosecution prioritized its duty to search for Brady and RCM 701(a)(6) material under Williams. First, the defense had not

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<sup>2</sup> The defense stated that it made a request for these materials in 2011. Until 10 May 2012, the defense made no request. The prosecution assumes the defense believes its blanket requests for all DoS files included these materials. The prosecution has repeatedly stated its position that the requests are not specific to inform a search. See discussion *infra*.

requested this information with specificity until three weeks ago. Second, during the conference, the prosecution stated that the DoS is currently working to provide all responsive files, including any information from the groups listed above, to the prosecution for its review for Brady or RCM 701(a)(6) material. The DoS chose to prioritize the production of the damage assessment; however they continued to work on accumulating the documents from throughout the DoS and their many different systems.

The prosecution disputes paragraph 7 of the Supplement insofar as the Court ordered the prosecution to put together a list of all the evidence (both documentary and testimonial) that it intends to introduce in aggravation.” Supplement, at 2. The Court did not order the prosecution to list each specific piece of evidence it intends to use in aggravation, but instead ordered the prosecution to provide a list of what type of evidence it intends to use in aggravation solely to assist the Court in conducting its Military Rule of Evidence (MRE) 505 review to make discovery determinations. The Court clarified that the prosecution may present an unclassified version of such evidence; again, sufficient for the Court to conduct its MRE 505 review to make discovery determinations. The Court did not order the prosecution to specifically identify each piece of aggravating evidence it intends to use. The prosecution also specifically acknowledged that it will not use certain aggravation evidence, although it might exist during its presentencing case.

The parties agree that the FBI and DSS participated in a joint investigation with CID of the accused. The parties agree that DoS, DoJ, Government Agency, and ODNI are entities closely aligned with the prosecution, for purposes of Williams. See Government Response to Discovery #2, at 2.

The parties agree that FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See id., at 2.

### **LEGAL AUTHORITY AND ARGUMENT**

The prosecution shall, *inter alia*, search for Brady and RCM 701(a)(6) material, disclose Brady and RCM 701(a)(6) material, and permit the defense to inspect materials within the possession, custody, or control of military authorities under RCM 701(a)(2). The prosecution requests the Court deny the defense’s request for the prosecution to account for the steps it has taken in fulfilling its discovery obligations and deny the defense’s discovery requests.

#### **I: DUTY TO SEARCH FOR BRADY AND RCM 701(a)(6) MATERIAL**

The prosecution shall search the following: (1) its own files; (2) the files of law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses; (3) the investigative files in a related case maintained by an entity closely aligned with the prosecution; and (4) other files, as designated in a defense discovery request, that involved a specified type of information within a specified entity. See United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999).<sup>3</sup>

<sup>3</sup> The prosecution also bears an obligation to search for Brady and RCM 701(a)(6) material under its own ethical rules. The prosecution has produced twenty-seven damage assessments, pursuant to its ethical obligation and absent

#### A. The Prosecution's Own Files

The prosecution has searched its own files and disclosed any Brady and RCM 701(a)(6) material contained therein. The defense argues that the prosecution's own files include the Headquarters, Department of Army (HQDA) records. The HQDA records at issue are those that the prosecution retrieved pursuant to its independent ethical obligations, and *not* a defense request. The prosecution is searching those records for Brady and RCM 701(a)(6) material.

#### B. Law Enforcement Files

Here, the parties agree that CID, FBI, and DSS are law enforcement authorities that have participated in the investigation of the subject matter of the charged offenses. Thus, the prosecution shall search the CID, FBI, and DSS files for Brady and RCM 701(a)(6) material. The prosecution has produced the entire CID and DSS files relating to the accused. See Prosecution Response to Defense Motion to Compel Discovery #2, at 2, 15. The prosecution has produced, at a minimum, all Brady and RCM 701(a)(6) material from the FBI law enforcement file relating to the accused.

The prosecution further requested that the FBI search its entire records for information relating to any damage resulting from the charged offenses. The prosecution discovered that the FBI conducted an impact statement, *outside of the FBI law enforcement file*, for which the prosecution intends to file an *ex parte* motion under MRE 505(g)(2).<sup>4</sup>

#### C. Closely Aligned Entities

Here, the parties agree that DoJ,<sup>5</sup> Government Agency, DoS, ODNI, DIA, DISA, CENTCOM, and SOUTHCOM are entities closely aligned with the prosecution under Williams. Thus, the prosecution shall search the DoJ, Government Agency, DoS, ODNI, DIA, DISA, CENTCOM, and SOUTHCOM files for Brady and RCM 701(a)(6) material, and the prosecution recognizes that some of these organizations also fall within the DoD and could be subject to discovery requests under RCM 701(a)(2) (discussed below). The prosecution has produced, or disclosed to the Court all forensic results or investigative files, and damage assessments by DoJ and Government Agency that are discoverable under Brady and RCM 701(a)(6). The

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a defense request or originating from a closely aligned organization under Williams. The prosecution is coordinating to search the President's Intelligence Advisory Board for Brady and RCM 701(a)(6) material under its ethical obligation, based on having an independent good faith basis that Brady and RCM 701(a)(6) material might exist.

<sup>4</sup> The prosecution has intended to address this matter during the discussion of the case calendar at the upcoming RCM 802 conference. Once the prosecution receives approval to disclose classified or unclassified information, the prosecution intends to produce any Brady or RCM 701(a)(6) material to the defense *as soon as possible*; however, the current case calendar outlines MRE 505 proceedings to take place at a future date.

<sup>5</sup> The prosecution has defined DoJ as Main Justice and the United States Attorney's Offices, and not its subordinate organizations, to include the FBI. See AE XLIX at 5.

prosecution continues to search ODNI, DIA, DISA, CENTCOM, and SOUTHCOM files for Brady and RCM 701(a)(6) material.

The DoS is "the lead U.S. foreign affairs agency within the Executive Branch and the lead institution for the conduct of American diplomacy." See Enclosure # at 6. The DoS "operates more than 270 embassies, consulates, and other posts worldwide staffed by Locally Employed (LE) Staff and more than 13,500 Foreign Service officers[]" and over 10,500 civil service corps employees, and a total of 29,832 full-time permanent employees. See Id at 6-7. As such, conducting its Williams search of DoS files for Brady and RCM 701(a)(6) material is a challenging, time-consuming task. The prosecution has produced all DoS forensic results and investigative files that are discoverable under Brady and RCM 701(a)(6). Further, as of 18 May 2012, the DoS damage assessment has been available for defense counsel to inspect pursuant to the prosecution's filing. The prosecution continues to work with the DoS to search the DoS records for Brady and RCM 701(a)(6) material, to include information relating to the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and the DoS reporting to Congress.

The prosecution is not closely aligned under Williams with ONCIX, a subordinate organization to ODNI, because the prosecution does not share a working relationship with ONCIX. See AE XLIX at 4-5. The prosecution has not been given access to review all ONCIX records. The prosecution is actively seeking authority to review such records for Brady and RCM 701(a)(6) material.

#### D. Defense Requests

On 10 May 2012, the defense made a specific request from a specific entity under Williams for records from the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team, and the DoS reporting to Congress. The prosecution agrees with the defense that the prosecution already bore this obligation (i.e., files of closely aligned entities under Williams). However, as stated above the process is challenging and time-consuming and the prosecution continues to work with the DoS to search DoS records for Brady and RCM 701(a)(6) material, including records relating to the groups listed by the defense.<sup>6</sup> The ongoing search for Brady and RCM 701(a)(6) material at the DoS does not reflect upon the "diligence" of the prosecution, but instead upon the gravity of the charged offenses and the widespread United States Government response, including the response within entire Departments of the Executive Branch. See AE XII, at 1.

The prosecution continues its position that the defense has not provided an adequate basis or additional information to support its request for the results of any investigation or review relating to the Interagency Committee Review or the House of Representatives Oversight Committee. The defense has not provided a sufficient request for why Brady material (information that is favorable to the accused and material to either guilt or punishment) exists in these alleged records. These requests do not constitute specific requests under Williams.

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<sup>6</sup> The prosecution maintains that the defense has not provided an adequate basis for the discovery or production of such records, outside any Brady or RCM 701(a)(6) material.

## **II: DUTY TO DISCLOSE BRADY AND RCM 701(a)(6) MATERIAL.**

The prosecution shall, and will, disclose Brady and RCM 701(a)(6) material even in the absence of a defense request. The prosecution has already produced Brady and RCM 701(a)(6) material, to include twenty-seven separate damage assessments. For any remaining Brady and RCM 701(a)(6) material which has been discovered, the prosecution is diligently working for the approval to disclose that information to the defense or, should the prosecution seek limited disclosure, file an *ex parte* motion under MRE 505(g)(2).

The defense continuously speculates that the prosecution is withholding Brady information because the prosecution has not produced large amounts of Brady information. This speculation is based on a faulty premise—that extensive Brady information exists. The defense fails to contemplate that Brady information is simply lacking. To date, the prosecution has not discovered any exculpatory information. The prosecution has identified some mitigation evidence and possible Giglio material, and has produced or is seeking approval to produce that material.

## **III: DUTY TO PERMIT THE INSPECTION OF MATERIALS UNDER RCM 701(a)(2).**

The parties agree that CID, DIA, DISA, CENTCOM, and SOUTHCOM are military organizations or entities. The parties agree that the FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX are not military organizations or entities. See *id.*, Government Response to Defense Motion to Compel Discovery #2, at 2. The FBI, DSS, DoS, DoJ, Government Agency, ODNI, and ONCIX records are not within the possession, custody, or control of military authorities. See *id.* at 8-14. Accordingly, any FBI, DSS, DoS, DoJ, Government Agency, ODNI, or ONCIX records are discoverable under Brady and RCM 701(a)(6) (as described above), but not under RCM 701(a)(2).<sup>7</sup> Since prior to referral, the prosecution has consistently informed the defense that they have not provided an adequate legal basis for discovery of the FBI, DSS, DoS, DoJ, Government Agency, ODNI, or ONCIX records, because they are requesting the material under RCM 701(a)(2), yet the defense still continually submits requests under RCM 701(a)(2).

## **IV: THE GRAVITY OF THE CHARGED OFFENSES, THE WIDESPREAD UNITED STATES GOVERNMENT RESPONSE, AND THE ACCUSED'S DUE PROCESS RIGHTS LEAD TO A CHALLENGING DISCOVERY PROCESS TO ENSURE THE ACCUSED RECEIVES A FAIR TRIAL.**

The purpose of this Response is to simplify the discovery process in light of the gravity of the charged offenses and the necessary widespread United States Government response. Above all, the prosecution's obligation under Williams is an arduous task, though manageable, for two reasons: first, many of the records the prosecution has or will search are classified, which requires the prosecution to gain approval to review and, if necessary, disclose those files to the defense; second, the entities under Williams are numerous and include some of the largest federal agencies or Departments in the United States Government (e.g., DoS, ODNI, FBI, DoJ,

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<sup>7</sup> Any records may also be discoverable under RCM 914 and other evidentiary rules.

DIA). This complicates the gathering of, and prolongs the review of, such files. These complications exist largely because of the gravity of the charged offenses – the quantity of information, substance of the information, and the national security concerns inherent in the compromised information.

### CONCLUSION

The prosecution respectfully requests the Court deny the defense's request that the prosecution account for the steps that it has taken in fulfilling its Brady obligations for the reasons provided in the Prosecution Response to Defense Motion to Compel Discovery #2.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 31 May 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC  
U.S. Army, xxx-xx-  
Headquarters and Headquarters Company, U.S.  
Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

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**DEFENSE REPLY TO  
PROSECUTION RESPONSE TO  
SUPPLEMENT TO  
DEFENSE MOTION TO  
COMPEL DISCOVERY #2**

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**DEFENSE MOTION FOR  
MODIFIED RELIEF**

2 June 2012

RELIEF SOUGHT

1. In its Motion to Compel Discovery #2, the Defense sought the following:

In accordance with the Rules for Courts Martial (R.C.M.) 701(a)(2), 701(a)(5), 701(a)(6) and 905(b)(4), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order:

a) Full investigative files by CID, DIA, DISA, and CENTCOM/SOUTHCOM related to PFC Manning, WikiLeaks, and/or the damage occasioned by the alleged leaks be produced to the Defense under R.C.M. 701(a)(2). Further, that the HQDA file related to the 17 April 2012 request be produced under R.C.M. 701(a)(2) and 701(a)(6).

b) FBI, DSS, DOS, DOJ, Government Agency, ODNI, and ONCIX files in relation to PFC Manning and/or Wikileaks be produced to the Defense, or alternatively, that they be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that the files of the above agencies are not within the possession, custody, or control of military authorities, the Defense still requests that the Court order production of the entire file under the "relevant and necessary" standard under R.C.M. 703(f);

c) The Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6);

d) The Government produce *Brady* materials from certain identified agencies;

e) The Government produce all evidence intended for use in the prosecution case-in-chief at trial obtained from DIA, DISA, CENTCOM/SOUTHCOM, FBI, DSS, DOS, DOJ, Government Agency, ODNI, ONCIX and any aggravation evidence that it intends to introduce during sentencing from the above named organizations.

2. The Defense modifies its request for relief as specified below:

- a) The Defense moves for the Court to suspend these proceedings and order the Government state with specificity the steps it has taken to comply with its requirements under R.C.M. 701(a)(6). Once a complete accounting is done, the Court and the parties can determine the best way forward. The Defense requests that the Court hear oral argument on the Defense's request for a due diligence statement prior to hearing oral argument on the Motion to Compel Discovery.
- b) The Defense also moves to compel the following discovery:
  - i) The four T-SCIF computers that the Government represented would be produced on 18 May 2012. On 16 April, the Government stated it was confident that the 4 computer hard drives could be provided by 18 May 2012. The computer hard drives were not provided on 18 May 2012. On 29 May, the Defense asked when it should expect to receive the hard drives. The Government indicated that they would have approval by the end of the week. As of 2 June, 2012, the Government still has not produced these four hard drives. See Attachment A.
  - ii) The FBI impact statement under R.C.M. 701(a)(2) and 701(a)(6);
  - iii) The ONCIX damage assessment under R.C.M. 701(a)(2) and 701(a)(6).

#### WITNESSES/EVIDENCE

3. The Defense does not request any witnesses for this motion but does request the Court to consider the referenced documents and the previous pleadings of the parties.

#### FACTS

4. For the benefit of the Court, the Defense would like to provide a timeline with respect to requests for discovery from the Department of State, along with supporting attachments. This timeline will aid the Court in determining issues raised in the Defense's Motion to Compel Discovery #2.

#### Discovery Request for Information from Department of State

8 December 2010: Discovery request for "All forensic results and investigative reports by the Department of State regarding the information obtained by Wikileaks as referenced by Assistant Secretary of State for Public Affairs P.J. Crowley. Additionally,



any specific damage assessment by the Department of State regarding the disclosures of the diplomatic cables by WikiLeaks. Any assessment, report, e-mail, or document by Secretary of State Hillary Rodham Clinton regarding the disclosures of diplomatic cables by Wikileaks. Any report, e-mail, or document discussing the need for the State Department to disconnect access to its files from the government's classified network." Attachment D to Appellate Exhibit XVI at paragraph 2(b).

16 February 2011: Discovery request for "Access to all classified information that the government intends to use in this case. To include any damage assessment or information review conducted by any governmental agency or at the direction of a government agency." Attachment D to Appellate Exhibit XVI at paragraph 2(e).

13 October 2011: Discovery request for "Department of State: Any and all documentation relating to a review of the alleged leaks in this case and any specific damage assessment by the Department of State regarding the disclosure of diplomatic cables, the subject of this case, by WikiLeaks." Attachment F to Appellate Exhibit XVI at paragraph 1(c)(vi).

22 November 2011: Discovery Request for Production of Evidence Article 32 "Department of State: The Department of State formed a task force of over 120 individuals to review each released diplomatic cable. The task force conducted a damage assessment of the leaked cables and concluded that the information leaked either represented low-level opinions or was already commonly known due to previous public disclosures. According to published reports in multiple new agencies, including the Associated Press, The Huffington Post, and Reuters, internal U.S. government reviews by the Department of Defense and the Department of State have determined that the leak of diplomatic cables caused only limited damage to U.S. interests abroad, despite the Obama administration's public statements to the contrary. "A congressional official briefed on the reviews stated that the administration felt compelled to say publicly that the revelations had seriously damaged American interests in order to bolster legal efforts to shut down the WikiLeaks website and bring charges against the leakers. According to the published account "We were told (the impact of WikiLeaks revelations) was embarrassing but not damaging," said the official, who attended a briefing given in late 2010 by State Department officials. National security officials familiar with the damage assessments being conducted by defense and intelligence agencies told Reuters the reviews so far have shown "pockets" of short-term damage, some of it potentially harmful." See generally, [http://www.huffingtonpost.com/2011/01/19/us-official-wikileaks-rev\\_n\\_810778.html](http://www.huffingtonpost.com/2011/01/19/us-official-wikileaks-rev_n_810778.html)). This determination is at odds with the classification review conducted by the OCA. Mr. Patrick Kennedy should not be permitted to espouse an opinion which is inconsistent with the damage assessments conducted by the government. *Brady v. Maryland*, 373 U.S. 83 (1963); *Jencks v. United States*, 353 U.S. 657 (1957)." Attachment H to Appellate Exhibit XVI at paragraph 5(c).

1 December 2011: Discovery Request to Compel Production of Evidence Article 32 "The collateral investigations by the Department of State, the Federal Bureau of Investigation, the Defense Intelligence Agency, the Office of the National Counterintelligence Executive and the Central Intelligence Agency. The defense is entitled to receive any forensic results and investigative reports by any of the cooperating

agencies in this investigation. *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999); *United States v. Bryan*, 868 F.2d 1032, 1036 (9<sup>th</sup> Cir. 1989); *United States v. Brooks*, 966 F.2d 1500, 1503 (1992); Article 46, Uniform Code of Military Justice (UCMJ). *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] has provided all forensic results and investigative reports requested that are in its possession and that the United States has authority to disclose."* Attachment J to Appellate Exhibit XVI at paragraph 7(d)(iv).

"The Department of State damage assessment review conducted by its task force of over 120 individuals. This task force reviewed each released diplomatic cable. *See* Appendix G. *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] does not presently have the authority to disclose damage assessments, if any, cited by the defense and will make a determination whether to provide the information if and when it becomes available."* *Id.* At paragraph 7(d)(vi).

"This is a news story by Reuters indicating the State Department representatives testified before a congressional hearing on the release of diplomatic cables. According to the news accounts, the State Department official told Congress that they the impact of the releases were embarrassing but not damaging." Appendix G to Attachment J to Appellate Exhibit XVI.

20 January 2012: Discovery request: "Does the Government possess any report, damage assessment, or recommendation by the Department of State concerning the alleged leaks in this case? If yes, please indicate why these items have not been provided to the Defense. If no, please indicate why the Government has failed to secure these items." Attachment L to Appellate Exhibit XVI at paragraph 3(e).

#### Other Relevant Facts

10 March 2011: Ambassador Kennedy testifies to Congress about the existence of a Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and the DOS report to Congress. *See* Attachment B.

2 December 2011: the Defense submitted its witness list to the Article 32 Investigating Officer, naming Ambassador Patrick Kennedy as witnesses. *See* Court's Ruling Appellate Exhibit XXXIII.

14 December 2011: the IO determined that Mr. Kennedy was not reasonably available. *Id.*

20 January 2012: the Defense filed with the Government a Discovery Request wherein it asked for complete contact information for Ambassador Patrick Kennedy. *Id.*

23 January 2012: the Defense filed a request for an oral deposition of Mr. Kennedy with the General Court-Martial Convening Authority. *Id.*

27 January 2012: the Government responded that it would not provide contact information for Mr. Kennedy because he was not a Government witness, but if he later became a Government witness they would provide access. *Id.*

1 February 2012: the Defense requested contact information for Ambassador Patrick Kennedy in order to explore calling Mr. Kennedy as a Defense witness. The Government indicated it would provide contact information for Mr. Kennedy. *Id.*

1 February 2012: the GCMCA denied the Defense's request to order a deposition of Mr. Kennedy. *Id.*

16 February 2012: the Defense filed its Motion to Compel a deposition of Mr. Kennedy; the Defense also filed Motion to Compel Discovery #1, seeking *inter alia*, damage assessments by the Department of State. *See* Appellate Exhibits VII and VIII.

28 February 2012: the Defense renewed its request for contact information for Mr. Kennedy. *See* Attachment A to Appellate Exhibit XXV.

29 February 2012: the Government indicated that the Defense would have to submit a *Touhy* request in order to speak with Mr. Kennedy. The Government asserted that it first became aware of the possible *Touhy* issue earlier that very week. *See* Attachment C to Appellate Exhibit XXV.

13 March 2012: the Defense filed its Reply to the Government's Response to the Defense's Motion to Compel a deposition of Mr. Kennedy; the Defense also filed a Reply to the Government's Response to Motion to Compel Discovery. *See* Appellate Exhibits XXV and XXVI.

15 -16 March 2012: Court considers the Defense's Motion to Compel Discovery and Depositions.

16 March 2012: Court issues its Ruling on Defense Motion to Compel Depositions. The Court denied the Defense's request to compel a deposition of Mr. Kennedy. The Court determined that the Government has not impeded the Defense's access to Mr. Kennedy and that the Government has volunteered to assist the Defense in coordinating interviews and in any applicable *Touhy* process. The Court also determined that there was no evidence that Mr. Kennedy would not be available for trial. *See* Appellate Exhibit XXXIII.

23 March 2012: The Court issued its Ruling on the Defense Motion to Compel Discovery. *See* Appellate Exhibit XXXVI. The Court held that the Government had a due diligence duty to search for evidence that is favorable to the Defense and material to guilt or punishment. This included a due diligence duty to search any damage assessment pertaining to the alleged leaks in this case made by the DOS. The Court ordered the Government to notify the Court NLT 20 April 2012 whether any forensic results or investigative files relevant to this case existed within the DOS. Finally, the Court ordered the Government to immediately begin the process of producing the damage assessment from the DOS. *Id.*

23 March 2012: the Defense submits its *Touhy* request by Fed-Ex to the DOS and emailed a copy of the request to the Government listing Mr. Kennedy as the DOS witness and specifically discussing the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DOS reporting to Congress. *See* Attachment C.

26 March 2012: The Government sought clarification based upon the Court's 23 March Order. The Government stated that the DOS had not completed a damage assessment. The Government also stated "... although the Department has monitored and continues to monitor the impact of the release of the cables discussed in Under Secretary's Kennedy's declaration in this case, the Department has not finalized an assessment of the damage to date, or over a shorter interim period of time. The Department only has a working draft that is not complete." The Government also acknowledged that it was "aware of investigative files maintained by the FBI and DOS." See Attachment B.

27 March 2012: the Defense sent to the Government and Court the statement by Mr. Kennedy before the Senate Committee on Homeland Security and Governmental Affairs. The email discussed in detail the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team, and DOS reporting to Congress. The Defense maintained that the issue was not whether there is a "completed" damage assessment, but whether the DOS had done what Mr. Kennedy testified to at the Senate hearing. The Defense stated that all of this information should be produced to the Defense under paragraphs 4-6 of the Court's 23 March 2012 Ruling. *Id.*

28 March 2012: the Government sent an email to the Court and Defense stated that it disagreed with the Defense's interpretation of Mr. Kennedy's statement. The Government requested an opportunity to discuss the issue at an 802 conference that day. See Attachment D.

28 March 2012: the Court conducted a telephonic 802 session with the parties. The Court indicated that the Government would need to either produce what the DOS had, or produce a witnesses to testify regarding the DOS's efforts.

9 April 2012: the Government stated that they had been notified that the legal advisor to the DOS had received the Defense's *Touhy* request. See Attachment E.

9 April 2012: the Defense asked if the DOS had done anything on the request since it had been two weeks since the Defense Fed-Ex'd the request to the DOS. *Id.*

13 April 2012: the Defense requested the Government to provide it with an update on the *Touhy* request for Mr. Kennedy. *Id.*

16 April 2012: the Government stated that the DOS was processing the Defense's *Touhy* request and might have an answer by the end of the week. *Id.*

17 April 2012: the Court sent an email to the parties requesting that the Government advise the Court as to the State Department representative would be available for the 17 April Article 39(a). See Attachment F.

20 April 2012: the Government provided notice to the Court and the Defense that the DOS had forensic results and investigative files. The Government represented that it had reviewed this information for evidence that was favorable to the accused and material to either guilt or punishment. The Government also represented that "prior to the Court's order, the United States produced this information to the defense." See Appellate Exhibit LVI.

20 April 2012: The Government sent an email to the parties indicating that the DOS witness was no longer needed since the DOS would authorize the Government to submit, *in camera* and *ex parte*, the classified draft assessment along with an explanation of the draft, for the Court's review. The Government maintained that "the draft damage assessment was not discoverable under RCM 701(a)(6) or *Brady* because it was a mere draft." See Attachment F.

11 May 2012: the Court issued its Ruling Granting the Government's Motion to Reconsider the Court's ruling of 23 March 2012 with respect to the DOS Damage Assessment. Having reconsidered the ruling, the Court found that the fact that the DOS Damage Assessment is a draft does not make the draft speculative or not discoverable under RCM 701. As such, the Court order the Government to comply with the 23 March 2012 Ruling. See Court Ruling 11 May 2012.

15 May 2012: the Defense requested if the Government had any update on the *Touhy* request for Mr. Kennedy. See Attachment E.

15 May 2012: the Government stated that had made an inquiry this morning and should be hearing back from the DOS in the next day or two. The Government had not provided any further update on the *Touhy* request. *Id.*

## ARGUMENT

### **A. The Government's Lack of Due Diligence With Respect to the Department of State**

5. The Government makes a big production in its Response to Supplement to Defense Motion to Compel Discovery #2 [Government Response to Supplement] that "until recently, the defense has not requested any information from, yet alone reference [sic], the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress." Government Response to Supplement, p. 2. It states that "neither the pre-referral discovery requests nor the Defense Motion to Compel Discovery makes such a request." *Id.* It further states that it disputes paragraph 6 "insofar as the defense stated that it made discovery requests for "the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress." *Id.* In footnote 2, it states again, "until 10 May 2012, the defense made no request for [these items]. ... The prosecution has repeatedly stated its position that the requests are not specific to inform a search." *Id.* As if its position was not clear, the Government states once again, the "defense had not requested this information with specificity until three weeks ago." *Id.* at p. 3. The Government's submissions suggest that it was *only just now* learning that the Department of State had information related to the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team or the DoS Reporting to Congress. Nothing could be further from the truth.

6. By its own admission, Patrick Kennedy testified before Congress as to the existence of the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress on 10 March 2011. See Government Response to Supplement, p. 1. Accordingly, the Government had notice 15 months ago that there were documents within the Department of State that could contain *Brady* material.

7. Moreover, as the above timeline reveals, the parties have been litigating about this very issue for months. The timeline shows:

- There have been six pre-referral discovery requests for material within the Department of State with respect to the alleged leaks;
- The Defense moved to compel Department of State damage assessments at the Article 32 hearing;
- The Defense moved to compel damage assessments, forensic results and investigative files from the Department of State in the Motion to Compel Discovery #1;
- The Government has knowledge that the Defense has been seeking to depose Mr. Patrick Kennedy about for approximately 8 months;
- The Defense's *Touhy* request on 23 March 2012, which a copy was provided to the Court and Government counsel, referenced the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress; and
- The Defense submitted Mr. Kennedy's declaration (regarding the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress) to the Court on 27 March 2012.

8. One must also not forget the context in which all these battles were fought. The Government refused to acknowledge what the Department of State had and did not have in terms of documentation with respect to the leaks (in fact, the Government referred to the Department of State damage assessment as "alleged"). For instance, in its Response to the Defense Motion to Compel #1, it stated "The United States disputes any allegation, including those relating to whether, when, and to what extent select agencies, departments and organizations reviewed the compromised information, supported by unofficial public statements." Appellate Exhibit XVI, p. 1. The Defense then proffered publicly available documents referring to the Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress to prove to the Court that the Department of State, a closely aligned agency, had information that was clearly relevant to the charged offenses. For the Government to imply that it was not "on notice" of material within the Department of State because the Defense had not made a request for this specific material is unbelievable.

9. Toward the end of the Government Response to Supplement, it states in passing, that "[t]he prosecution agrees with the defense that the prosecution already bore this obligation [to search the files of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress] (i.e., files of closely aligned agencies under *Williams*." *Id.* p. 5. If the Government agrees that it was already obligated to search these files under *Brady/Williams*, why are there no less than five references in its submission to the fact that the Defense did not file a formal discovery request for this particular information? Such a request is entirely superfluous given the Government's: a) actual knowledge that these documents exist, and; b) the Government's existing obligations under *Brady* to search these documents.<sup>1</sup>

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<sup>1</sup> The Government states that the "Supplement itself confirms the defense's ultimate objective in questioning the DoS witness where the defense proffers that it will ask the witness 'in what form' any documents are in; namely, to later formulate discovery requests." Government Response to Supplement, p. 1. The Government's position makes no sense. The Defense has already submitted no less than nine discovery requests (including motions to compel) for

10. The Defense's latest discovery request for *Brady* from the files of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress did not trigger the Government's *Brady* obligation. The obligation already existed once it had knowledge (constructive or actual) that such files existed within the Department of State. At the very latest, the Government's *Brady* obligation to search through these files crystallized in March 2011, when Ambassador Kennedy made his public declaration.<sup>2</sup> Since then, 15 months have elapsed and the Government has not yet received, much yet reviewed, these files. See Government Response to Supplement, p. 2 ("the prosecution *intends* to review all [DOS] documents for *Brady*..."); p. 3 ("the DoS is currently working to provide all responsive files, including any information from the groups listed above"). The fact that the *Department of State* "chose to prioritize the production of the damage assessment" is irrelevant. See Government Response to Supplement, p. 3. The Department of State does not bear *Brady* obligations, the Government does. While the Department of State is a large organization and obtaining *Brady* and other discoverable material may be "challenging [and] time-consuming," there is no excuse – and can be no excuse – for letting over two years go by since placing PFC Manning in pre-trial confinement without reviewing Department of State documents for *Brady*. Government Response to Supplement, p. 5.

11. There is no reason why production and review of Chiefs of Mission, WikiLeaks Working Group, Mitigation Team and the DoS Reporting to Congress could not have been accomplished simultaneously with the production of the Department of State damage assessment (though the Defense submits that such a review and production should already have occurred, at the latest, in the March 2011 timeframe when Ambassador Kennedy made his statements). In other words, the production of the Department of State damage assessment and the review/production of other Department of State files (including, but not limited to, those four referenced files) are not mutually exclusive.

12. As if to justify its failure to review Department of State files for *Brady* at this late date, the Government points out that "as of 18 May 2012, the DoS damage assessment has been available for defense counsel to inspect pursuant to the prosecution's filing." Government Response to Supplement, p. 5. The Government's statement is only a half-truth. The Government has imposed arbitrary limitations upon the Defense's access to the Department of State damage assessment. In particular, the Defense must give the Government at least four duty days' notice in order to access the damage assessment. This would mean that the earliest the Defense could have accessed the damage assessment was 25 May 2012 (one week ago). The Government also imposed another limitation on the Defense's access: Defense counsel could only access the document in the presence of its security experts. Thus, access involves coordinating with the Government and its own experts, who have many other responsibilities. During the telephonic 802 conference, the Defense raised the issue of the restrictions placed upon access. In particular, the Defense stated that it was difficult to coordinate with Defense experts to be present because

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information from the Department of State. If the Government provides this information, as it is required to do, there is no need for "later discovery requests."

<sup>2</sup> The Defense submits that the obligation may have actually crystallized much earlier. By its own admission, the Government and the Department of State are closely aligned and share a close working relationship. It has a duty to inform itself, therefore, of files within the Department of State which might contain *Brady* material. If the Mitigation Team, Working Group, etc. were assembled (as the Defense suspects) in the immediate aftermath of the leaks, the Government bore an obligation to search these files earlier than March 2011.



the experts' command was tasking them to do duties that took them out of the D.C. area. The Defense followed-up with MAJ Fein on this issue, providing him with a Memo for the Convening Authority which confirmed for the experts (and their command) that their first priority was this case. On 1 June 2010, the Government – rather than making it *easier* for the Defense to access the Department of State damage assessment, made it *harder*. The Government is now stating that the Defense must submit a formal request through the convening authority to re-approve the appointment of the Defense experts. The convening authority would then have the ability to either approve or *disapprove* the necessity for these experts. See Attachment G.

13. The bottom line is that the Government is closely aligned with the Department of State. It had knowledge – at the very latest, in March 2011 – that the Department of State had created the Chiefs of Mission review, WikiLeaks Working Group, Mitigation Team and that the Department of State had reported to Congress. It likely knew about these things much earlier. It had a duty in early 2011, not in mid-2012, to arrange for a review of these files as part of its *Brady* obligations. Instead, it willfully chose to ignore its *Brady* obligations and, even worse yet, obfuscate for the Defense and the Court what materials the Department of State had and didn't have. The Government's utter lack of diligence with respect to the Department of State is emblematic of its "diligent *Brady* search" in other closely aligned agencies.

#### **B. Additional Facts In Support of the Defense's Request for a Due Diligence Statement**

14. The Government raises new issues in its latest submission that further bolster the Defense's argument that the Court should order a due diligence accounting.

15. First, the Government states that "the prosecution continues to search [ ] DIA, DISA, CENTCOM, and SOUTHCOM files for *Brady* and RCM 701(a)(6) material." Government Response to Supplement, p. 5. Again, this is a startling admission. These are the military's *own files*. Why hasn't the Government already searched its own files? Over two years have elapsed since the beginning of the case, trial is three months away, and the Government "continues to search" its own files? Much like the HQDA memo, if the Government has not already performed a *Brady* search in respect of files in its own backyard, it cannot be trusted to have diligently searched the files of other organizations. The Defense believes that there are only two possible explanations for this utter lack of diligence: a) the Government has not yet, after two years, searched its own files for some inexplicable reason; b) the Government already searched its own files using the wrong *Brady* standard; now that the Court clarified for the Government what is *Brady* obligations entail, the Government is going back and secretly doing the "re-review" that the Defense said was necessary.<sup>3</sup> Either way, the Government's conduct is inexcusable.

16. Second, the Government casually mentions that it "discovered that the FBI conducted an impact statement, *outside of the FBI law enforcement file*, for which the prosecution intends to file an *ex parte* motion under MRE 505(g)(2)." Government Response to Supplement, p. 4. What does the Government mean that it "discovered" that the FBI conducted an impact statement? The Government and the FBI engaged in a joint investigation of the accused and are

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<sup>3</sup> See Appellate Exhibit XXXI.



closely aligned. The Defense has repeatedly asked for documents from the FBI; moreover, the Government has a duty to turn over *Brady* even in the absence of a Defense Request. See Government Response to Supplement, p. 6 (“The prosecution shall, and will, disclose Brady ... even in the absence of a defense request.”).

17. On 20 January 2012, the Defense made the following discovery request: “Does the Government possess any report, damage assessment, or recommendation as a result of any joint investigation with the Federal Bureau of Investigation (FBI) or any other governmental agency concerning the alleged leaks in this case? If yes, please indicate why these items have not been provided to the Defense. If no, please indicate why the Government has failed to secure these items.” See Attachment L to Appellate Exhibit VIII at paragraph 3(b). On 31 January 2012, the Government responded: “The United States will not provide the requested information. The defense has failed to provide any basis for its request. The United States will reconsider this request when provided with an authority that obligates the United States to provide the requested information.” Attachment N to Appellate Exhibit VIII, paragraph 3(b).

18. Apparently, despite the Defense’s discovery request, the Government did not disclose the existence of the FBI impact statement in January. When was the impact statement prepared? Why is the Government only now “discovering” its existence, as if by happenstance, three months before trial? Presumably, the impact statement is something that has been in the works for a while. In other words, the FBI impact statement did not just magically appear out of thin air. Why has the Government not disclosed its existence to the Defense or to the Court? This latest revelation by the Government shows that the Court and the Defense are left completely in the dark about relevant documents that exist in closely aligned agencies until the Government decides, at its convenience, to confirm or reveal their existence. Further, the Government states that it intends to produce any *Brady* material “as soon as possible”; however, the current case calendar outlines MRE 505 proceedings to take place a future date.” Government Response to Supplement, p. 4. The subtext of this statement is that it will be months before the Defense gets access to the FBI’s impact statement.

19. Third, the Government again is trying to define its way out of conducting, and providing, *Brady* discovery. The Government apparently believes that the following request for documents from the Interagency Committee Review and the House of Representatives Oversight Committee is not a “specific” request under *Williams*: Government Response to Supplement, p. 4.

**Interagency Committee Review.** The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers, National Security Staff’s Senior Advisor for Information Access and Security Policy. Mr. Travers was tasked to lead a comprehensive effort to review the alleged leaks in this case. See Defense Discovery Request Dated 8 December 2010 and 13 October 2011 within Appellate Exhibit VIII;

**House of Representatives Oversight Committee.** The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa. The committee considered the alleged leaks in this case, the actions of Attorney General Eric Holder, and the investigation of PFC Bradley Manning. See Defense Discovery Request Dated 10 January 2011 and 13 October 2011 within Appellate Exhibit VIII

Government Response to Supplement, p. 4. Apparently, however, the following request for *Brady* from the President's Intelligence Advisory Board is a specific enough request:

**President's Intelligence Advisory Board.** Any report or recommendation concerning the alleged leaks in this case by Chairman Chuck Hagel or any other member of the Intelligence Advisory Board. *See* Defense Discovery Request Dated 13 October 2011 within Appellate Exhibit VIII;

20. The Defense cannot, under any stretch of the imagination, understand how the Interagency Committee Review and the House of Representatives Oversight Committee request is not sufficiently specific, but the President's Intelligence Advisory Board is. The Government provides no authority to suggest that this is not a specific request under *Williams*. In *United States v. Trigueros*, 69 M.J. 604 (Army Ct.Crim.App. 2010), the court found the following to be a specific request under *Williams* "copies of any and all records ... maintained by any health care provider, to include mental health care ... for any sessions with either Mrs. [JLC] or Mrs. [SCR]....". If the *Trigueros* request for "any and all records ... maintained by any health care provider [in respect of named individuals]" is a sufficiently specific request, then so too are requests for "The results of any investigation or review concerning the alleged leaks in this case by Mr. Russell Travers" or "The results of any inquiry and testimony taken by House of Representative Oversight Committee led by Representative Darrell Issa."

21. The Government also states that the "defense has not provided a sufficient request for why *Brady* material ... exists in these alleged records." Government Response to Supplement, p. 5. There are two problems with this statement. First, the Government is back to playing hide-the-ball by referring to these as "alleged records." *Id.* It already tried this with the "alleged damage assessments" and that did not work. Second (and more importantly), the Defense does not need to make a proffer, above and beyond the specific request, as to why *Brady* material might exist in these records. It is obvious that investigations into the harm occasioned by the leaks might reveal that the leaks did no damage – i.e. classic *Brady* material. So, it appears that we are back to square one: the Government still does not understand *Brady*.

22. Fourth, the Government continues to maintain that it is not closely aligned with ONCIX, despite the Court's ruling to the contrary. Government Response to Supplement, p. 5. The position is troubling, given the *Brady/Williams* requirement to search the files of closely aligned agencies. If the Government believes that ONCIX is not closely aligned, it must follow that it believes it does not need to conduct a *Brady* search of ONCIX's files. *See id.* at p. 5 ("The prosecution is not closely aligned under *Williams* with ONCIX ..."). In fact, the Government states "the prosecution has not been given access to review all ONCIX records." *Id.*, p. 5. Given this statement, the Defense has serious doubts as to whether the Government is complying with its *Brady* obligations with respect to ONCIX.

23. Fifth, and probably the most troubling, is the Government's 11<sup>th</sup> hour revelation that ONCIX has in fact produced a damage assessment, despite the Government's misrepresentations to the contrary. *See also* Defense Response to Government Notice to Court of ONCIX Damage Assessment. The Government represented to the Court on 21 March 2012 that "ONCIX has not produced any interim or final damage assessment in this matter." *See* Appellate Exhibit XXXVI. As such, the Court did not address ONCIX in its 23 March 2012 ruling, other than to say that the Government needed to search ONCIX for investigative files, forensic results, and *Brady*.

24. On 24 May, 2012, MAJ Fein wrote to the General Counsel at ONCIX, stating, "On March 23, 2012, the Court ruled that the Department of State's draft damage assessment was discoverable, *and did not rule on NCIX's draft*." See Prosecution Notice to Court of Identification of NCIX Damage Assessment, attached Letter from MAJ Fein to Tricia Wellman, May 24, 2012 (emphasis added). The reason that the Court "did not rule on NCIX's draft" was because the Government represented to the Court that ONCIX did not possess a damage assessment, in either completed or draft form. MAJ Fein makes it look like this is simply an error on the Court's part, stating "the "prosecution must notify the Court of the ... apparently inconsistency in the Court's order." To the extent that there is an "inconsistency" it is one which the Government created when it misrepresented to the Court on 21 March 2012 that ONCIX not have "any interim or final damage in this matter."

25. The Government waited over two months to tell the Defense and the Court about the ONCIX interim damage assessment. Undoubtedly, it will justify its failure to inform the Court of the interim damage assessment by stating that it was filing a motion for reconsideration of the 23 March 2012 ruling with respect to the Department of State damage assessment. The Government cannot use its own baseless motions for reconsideration – citing one case that is not on point from 1963 – to justify its failure to correct its misrepresentation to the Court. The trial counsel owes a duty of candor to the Court. See Rule 3.3 AR 27-26. By holding on to this information for two months, the Government has breached its duty of candor to the Court, resulting in a further delay of discovery for the Defense.

**D. Suspending the Proceedings Pending a Due Diligence Statement is Necessary to Preserve PFC Manning's Right to a Fair Trial**

26. As indicated above, the Defense modifies its request for relief in that it requests that this Court temporarily suspend the proceedings while the Government is preparing a due diligence statement. The Defense would agree that this time period (which the Defense submits should be no longer than a few weeks) would not be attributable to the Defense or the Government for speedy trial purposes.

27. To recap, the Defense is still waiting for *Brady* material and material discoverable under R.C.M. 701(a)(2) from at least the following organizations:

- a) Interagency Committee Review
- b) President's Intelligence Advisory Board
- c) House of Representatives Oversight Committee
- d) Chiefs of Mission review
- e) WikiLeaks Working Group
- f) "Mitigation Team" created by the Department of State
- g) Department of State's reporting to Congress
- h) Other DOS files
- i) DIA
- j) DISA
- k) CENTCOM and SOUTHCOM
- l) April 2012 HQDA Memo

- m) FBI generally; FBI Impact Statement
- n) DSS
- o) DOJ
- p) Government Agency
- q) ODNI
- r) ONCIX damage assessment; ONCIX generally
- s) 63 agencies and other organizations the Government has claimed to have contacted

28. The volume of unproduced discovery is staggering given that the trial is scheduled for September, a mere 3 months from now. If the proceedings are not temporarily suspended (i.e. the trial schedule proceeds as planned despite the Defense not receiving discovery) the following motions will be impacted:

1. Witness Lists (22 June 2012) – how can the Defense prepare a witness list when it has not seen discovery from over 20 different sources? [Note: the Witness List in turn impacts the Motion to Compel Experts and Witnesses (11 July 2012)]
2. M.R.E. 505(h)(1) Notice (22 June 2012) – how can the Defense give M.R.E. 505 notice when it still hasn't received all the discovery from Motion to Compel #1?
3. Motion to Compel Discovery #3 (22 June 2012) – if the Defense is still waiting for discovery from the Motion to Compel Discovery #1 and #2, how can the Defense file a motion to Compel Discovery #3?
4. Pre-Authenticate and Pre-Admit Evidence (22 June 2012) – unlike the Government, the Defense will not have the discovery to pre-admit or pre-authenticate by 22 June 2012.
5. Defense Notice of Plea and Forum (11 July 2012) – the discovery that the Defense received will enable the Defense to make informed decisions about plea and forum.
6. Speedy Trial/Article 10 (27 July 2012) – the Defense believes that is should not be forced to file a speedy trial motion until all discovery is produced; since diligence is part and parcel of a speedy trial motion, that motion cannot be resolved until the underlying discovery process is complete.

29. The Defense maintains that the Government's failures with respect to discovery have already impacted PFC Manning's right to a fair trial. The purpose of discovery is to enable the Defense to prepare its case. When the Defense is receiving discovery one month before trial (e.g. the "newly-discovered" ONCIX damage assessment; the FBI impact statement), there is no way that the Defense can adequately prepare its case. If the Government requires over two years to fulfill its "challenging" *Brady* obligations<sup>4</sup> (See Government Response to Supplement, p. 5), then surely the Defense requires some period of time longer than one month to integrate all the voluminous discovery into the case. The Defense submits that it should have, at a minimum, two to three months after all discovery is complete to prepare its case. The Government should not be able to circumvent its discovery obligations for two years, then dump discovery on the Defense last-minute, and expect that there will be a fair battle. Indeed, the Defense believes that this was the intention of the Government – to defeat its adversary by adopting untenable litigation positions designed to frustrate discovery.<sup>5</sup>

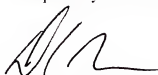
<sup>4</sup> What is more "challenging" than a *Brady* search is to litigate a case without the benefit of *Brady* (and other) discovery.

<sup>5</sup> For instance:

30. As the Government is apt to point out, this is a complicated case involving a great deal of information. How can the Defense be expected, after it took the Government two years to collect this information, to read, process and integrate this information into its case (including identifying witnesses; developing questions for witnesses; determining how this information can be used in cross-examination; determining how this information can be used for impeachment purposes; determining which of elements of the 22 specifications can be attacked using this information, etc.).<sup>6</sup> To allow the Government over two years to perfect its case and to allow the Defense a matter of weeks is simply unfair. It is setting the accused up to be denied his right to a fair trial, and is setting Defense counsel up to Ineffective Assistance of Counsel claims.

31. Accordingly, the Defense believes that if we continue with the current trial schedule at this point, we will have a rush to failure. Things are slipping through the cracks; the Government is just now "discovering" new damage assessments; there is still a large volume of unproduced discovery. Accordingly, the Defense requests that this Court suspend the proceedings for two to three weeks, order the Government to account for its *Brady* obligations, and then resume the proceedings once that accounting is complete.

Respectfully submitted,



DAVID EDWARD COOMBS  
Civilian Defense Counsel

- 
- a) Maintaining that *Brady* did not apply to punishment;
  - b) Maintaining that R.C.M. 701 did not apply to classified discovery;
  - c) Disputing the relevance of facially relevant items (such as damage assessments);
  - d) Using the R.C.M. 703 standard, instead of the appropriate R.C.M. 701 standard;
  - e) Referring to damage assessments as "alleged" to frustrate the Defense's access to them;
  - f) Maintaining that the Department of State and ONCIX had not "completed" a damage assessment;
  - g) Maintaining that it was "unaware" of forensic results and investigative files;
  - h) Resisting production of the Department of State damage assessment under the "authority" of *Giles* (which provided no legal support for its position);
  - i) Despite understanding Defense discovery requests, defining "damage assessments" and "investigations" to avoid producing discovery. After instructing the Defense that it should not use the term "damage assessments" to refer to informal reviews of harm (instead, to use "working papers"), to now refer to working papers as "damage assessments";
  - j) Insisting on a threshold of specificity for *Brady* requests that does not exist or some additional showing of relevance.

<sup>6</sup> The Court should bear in mind that much of this discovery will be classified, necessitating additional safeguards.

# ATTACHMENT A

## David Coombs

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**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Monday, April 16, 2012 5:31 PM  
**To:** David Coombs  
**Cc:** joshua.j.tooman.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Hard Drives (EnCase Forensic Images)

David,

As for the forensic drives, CID will continue examining the drives as per the Court's order and we will provide the results by 20 April 2012. However, in an effort to save time and resources for all parties involved (defense, government computer experts, government classification experts), we can produce the forensic images of the drives, as per the defense's original request. The defense will be able to conduct any analysis/procedure it wishes with complete copies of the drives.

We can wait until after 20 April 2012, however it will take more time after that to get those drives fully reviewed for security classification purposes, than merely the filenames. If the defense ultimately wants the forensic images and access to the files (as per the original motion and the renewed motion) sooner than later, the United States recommends the defense support this way forward, so we can divert CID resources from continuing to search for these programs and having to dedicate security experts to the review of the lists, and just have all of them focus on the actual files. We are confident we will be able to have them reviewed and approved, absent some unusual issue, by 18 May 2012.

Following this email, I will send you responses to your questions from Friday. My previous email was intended to simply explain that I will provide you answers by COB today, for your questions you asked on Friday.

v/r  
Ashden

-----Original Message-----

**From:** David Coombs [mailto:coombs@armycourt martialdefense.com]  
**Sent:** Monday, April 16, 2012 5:02 PM  
**To:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
**Cc:** joshua.j.tooman.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Hard Drives (EnCase Forensic Images)

Ashden,

I guess I don't understand what you are saying. If you are doing the searches for unauthorized software, per the Court's order, you should have the results NLT 20 April. If you are also doing a search utilizing the method the Defense experts suggested, you should have those results NLT 20 April. So I would like the results of either search on or before 20 April. At that point, we can discuss whether you would also provide an EnCase copy to the Defense.

Also, why can't you respond to any of the Defense's questions until Friday?

I would like to have the answers to the questions sooner rather than later, especially with respect to the following:

- 1) With regards to the unclassified damage assessments provided in discovery, when did the Government receive these documents?
- 2) Are there any more unclassified damages assessments in the Government's possession?
- 3) Who is the Government bringing from the Department of State for the motions hearing? Can you provide this person's contact information?

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
coombs@armycourtmarialdefense.com  
www.armycourtmarialdefense.com

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA [mailto:Ashden.Fein@jfhqncr.northcom.mil]

Sent: Monday, April 16, 2012 4:49 PM

To: David Coombs

Cc: joshua.j.tooman.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA;

Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten,

Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA

Subject: RE: Hard Drives (EnCase Forensic Images)

Importance: High

David,

Thank you. We will coordinate the forensic experts travel; however we are confused by your email. In the defense renewal of the motion to compel discovery, you ask the Court to "order the Government to conduct searches on the relevant computers...." After the initial review of the drives and understanding how much information will be required to be reviewed for classification, the United States is willing to perform exactly what the defense is requesting, with the addition of providing forensic images of the drives, as per the original request. It would be wholly less efficient for the defense and the United States to continue having our forensic experts conduct a cursory review of the drives and litigate this issue, when the government is willing to provide the defense the information you originally requested (assuming we obtain the proper approvals for any classified information). Please provide clarification.

We will provide you answers to your questions on Friday and updates on other issues by COB today.



v/r  
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]  
Sent: Monday, April 16, 2012 4:36 PM  
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
Cc: joshua.j.tooman.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR\MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
Subject: RE: Hard Drives (EnCase Forensic Images)

Ashden,

I would like for you to run the search per the court's order. Once we have the results of those searches, then I will give you my position on the option you propose. Additionally, I still need my forensic expert to travel this week to conduct needed forensic work, and I would like for him to be present for the motions hearing. Lastly, please provide answers to the other questions that I sent to you last Friday.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA [mailto:Ashden.Fein@jfhqncr.northcom.mil]  
Sent: Monday, April 16, 2012 3:53 PM  
To: David Coombs  
Cc: joshua.j.tooman.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR\MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
Subject: Hard Drives (EnCase Forensic Images)  
Importance: High

David,

After consultation with the government forensic experts, it appears that out of the 14 hard drives that were identified to be present in the TOC or SCIF, 2 drives are completely inoperable, 7 drives are wiped, 4 drives have file structures present, and 1 drive is partially wiped. In total, only 5 drives have any information that could answer your request and ultimately the Court's order, dated 23 March 2012.

Based on this information and in an effort to continue producing as much information in discovery as possible, regardless of classification, the United States is willing to produce forensic copies of the 5 drives to the defense, but only after receiving authorization from relevant OCAs, if classified information is identified on the drives. In order to make this happen, we will have our forensic experts continue their examination and then pass the information to the security experts to start a review. Our goal is to have the drives examined and approved for release by 18 May 2012, the Court's deadline for the other matters in the defense motion to compel.

The United States does not acknowledge any of the defense's arguments or stated interpretation of the relevant authorities. The United States maintains that a complete search of these drives is not material to the preparation of the defense, regardless of their classification. Additionally, the United States has never maintained that the forensic computer exams will take an extended period, but rather it would takes weeks for the security experts to review the 14 hard drives for classified information and the prosecution to obtain needed approvals. Now knowing that only five drives are at issue (the fifth being partially wiped), this process should not be too onerous for our security experts and they should be able to complete everything, including obtaining approvals, if any, within the next 30 days.

Please let us know whether this is acceptable and we will notify the Court. Additionally, please let us know whether you still require your forensic experts to travel this week or next week for the motions hearing.

v/r  
Ashden

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Saturday, April 21, 2012 5:39 PM  
**To:** David Coombs; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Cc:** Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); edl@cyberagentsinc.com; ts@cyberagentsinc.com  
**Subject:** RE: Computers

David,

We will start working on obtaining approvals to turn the drives over. Additionally, we will ensure that the modified contract is sent out to the defense expert and CPT Tooman as the government representative.

v/r  
Ashden

-----Original Message-----

**From:** David Coombs [<mailto:coombs@armycourt martialdefense.com>]  
**Sent:** Saturday, April 21, 2012 11:09 AM  
**To:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, John L CIV (US)  
**Cc:** 'Tooman, Joshua J CPT USARMY (US)'; Santiago, Melissa S CW2 USARMY (US); [edl@cyberagentsinc.com](mailto:edl@cyberagentsinc.com); [ts@cyberagentsinc.com](mailto:ts@cyberagentsinc.com)  
**Subject:** Computers

Ashden,

Please start the process of providing EnCase copies of the relevant hard drives to the Defense. Additionally, our experts did not receive a copy of the latest contract.

Best,

David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906

Toll Free: 1-800-588-4156

Local: (508) 689-4616

Fax: (508) 689-9282

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[<mailto:coombs@armycourtartialdefense.com>](mailto:coombs@armycourtartialdefense.com)

[www.armycourtartialdefense.com](http://www.armycourtartialdefense.com) [<http://www.armycourtartialdefense.com/>](http://www.armycourtartialdefense.com/)

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## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Tuesday, May 29, 2012 10:05 AM  
**To:** David Coombs; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; von Elten, Alexander S. CPT USA JFHQ-NCR/MDW SJA; Hurley, Thomas F MAJ USARMY (US); Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Reciprocal Discovery

David,

We expect to have approval to turn the drives over by the end of this week.  
We have copies ready to deliver to Fort Myer for your experts.

v/r  
Ashden

-----Original Message-----

From: David Coombs [mailto:coombs@armycourt martialdefense.com]  
Sent: Tuesday, May 29, 2012 9:59 AM  
To: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; von Elten, Alexander S. CPT USA JFHQ-NCR/MDW SJA; Hurley, Thomas F MAJ USARMY (US); 'Tooman, Joshua J CPT USARMY (US)'; 'Santiago, Melissa S CW2 USARMY (US)'; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
Subject: RE: Reciprocal Discovery

Ashden,

Thank you. Also, I just wanted to follow-up on the 4 computer hard drives.  
In a previous email, you indicated that the Defense would likely have these by 18 May. That was almost two weeks ago.  
Do you have an update on when the Defense will get access to the hard drive?

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
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www.armycourt martialdefense.com

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# ATTACHMENT B

## David Coombs

---

**From:** David Coombs <coombs@armycourtartialdefense.com>  
**Sent:** Wednesday, March 28, 2012 9:14 AM  
**To:** 'Lind, Denise R COL USARMY (US)'  
**Cc:** 'Matthew kemkes'; 'Bouchard, Paul R CPT USARMY (US)'; 'Santiago, Melissa S CW2 USARMY (US)'; 'Williams, Patricia CIV JFHQ-NCR/MDW SJA'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA'; 'Prather, Jay R CIV (US)'; 'Williams, Patricia CIV JFHQ-NCR/MDW SJA'; Ashden.Fein@jfhqncr.northcom.mil  
**Subject:** RE: Government Clarification Request Re: Dept. of State  
**Attachments:** TestimonyKennedy20110310.pdf

Ma'am,

My previous attempt to send this email may not have gotten through due to the word WL being in the body of the message. I have now made the needed changes to the my original message the starts below:

With regards to the Department of State damage assessments, the Defense requests that the Court review the statement by Ambassador Kennedy before the Senate Committee on Homeland Security and Governmental Affairs. Ambassador Kennedy clearly states that the DOS has done damage assessments. Specifically, within his testimony, Ambassador Kennedy notes the following:

- 1) When DoD material was leaked in July 2010, the DOS worked with DoD to identify any alleged State Department material that was in WL's possession;
- 2) The Department of State immediately asked Chiefs of Mission (Ambassador) at affected posts to review any purported State material in the release and provide an assessment, as well as a summary of the overall effect the WL release could have on relations with the host country;
- 3) "On November 28, 2010, the State Department took the following actions: 1) Established a 24/7 WL Working Group composed of senior officials from throughout the Department, notably our regional bureaus; 2) Created a group to review potential risks to individuals; and 3) Suspended SIPRNet access to NCD."
- 4) The Department of State also created a Mitigation Team to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of these documents
- 5) The Department of State convened two separate briefings for members of both the House of Representatives and the Senate within days (December 2, 2010) of the first disclosure by WL and appeared twice before the House Permanent Select Committee on Intelligence (December 7 and 9, 2010).

It is important to note that following the briefings referenced in paragraph 5, officials who attended those briefings were quoted by Reuters as stating that "the administration felt compelled to say publicly that the revelations had seriously damaged American interests in order to bolster legal efforts to shut down the WL websites and bring charges against the leakers." The same congressional official stated "we were told the impact of the WL revelations was embarrassing but not damaging."

The issue is not whether there is a "completed" damage assessment, but whether the Department of State has done what Ambassador Kennedy testified to at the Senate hearing. If so, all this material should be produced in accordance with paragraphs 4-6 of the Court's Order.

v/r  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
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[www.armycourt martialdefense.com](http://www.armycourt martialdefense.com)

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA [<mailto:Ashden.Fein@jfhqncr.northcom.mil>]

Sent: Monday, March 26, 2012 9:31 PM

To: Lind, Denise R COL USARMY (US)

Cc: David Coombs; Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA  
Subject: RE: Rulings: Motion to Compel Discovery; Amicus Curiae Filings (UNCLASSIFIED)

Ma'am,

In reference to the motion to compel discovery, the prosecution is confused by the Court's analysis in paragraph 2 on Page 10 and the ultimate order based on that analysis. As stated on/in the record, the Department of State has not completed a damage assessment. Furthermore, although the Department has monitored and continues to monitor the impact of the release of the cables discussed in Under Secretary's Kennedy's declaration in this case, the Department has not finalized an assessment of the damage to date, or over a shorter interim period of time. The Department only has a working draft that is not complete, and based on the document being a working draft, the Department has not authorized its release to any US Government agency, including the prosecution. The Court's analysis seems to group the completed assessment by the CIA's WTF with the Department's working draft. Based on no assessment or interim report existing, the prosecution is not clear with what the Court is ordering us to produce to the defense or for an in camera review.

Finally, to clarify any misunderstanding resulting from paragraph 8 on page 11, the prosecution is (was) aware of investigative files maintained by the FBI and DOS. Prior to referral, the prosecution produced the Diplomatic Security Services (investigative organization of DOS) documents, and immediately after the protective order was ordered the prosecution produced the approved documents from the classified FBI file. There are additional documents the prosecution is seeking approval to produce from the FBI and we have been working to obtain those approvals since



referral. The prosecution is unclear whether the Court intended to create a broad discovery order for material outside military authorities (encompassing material we have already produced) or a specific order for that material.

Thank you.

V/r  
MAJ Fein

-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]

Sent: Friday, March 23, 2012 6:30 PM

To: David Coombs

Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA

Subject: Rulings: Motion to Compel Discovery; Amicus Curiae Filings  
(UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

Attached are rulings re: Motion to Compel Discovery; Amicus Curiae Filings.

Ms. Williams please add as next AE in line.

D

Denise R. Lind  
COL, JA  
Chief Judge, 1st Judicial Circuit

Classification: UNCLASSIFIED

Caveats: NONE

## David Coombs

---

**From:** David Coombs <coombs@armycourtartialdefense.com>  
**Sent:** Wednesday, March 28, 2012 8:59 AM  
**To:** Ashden.Fein@jfhqncr.northcom.mil  
**Subject:** FW: Government Clarification Request Re: Dept. of State  
**Attachments:** TestimonyKennedy20110310.pdf

Ashden,

Below is the email, along with attachment, that I sent yesterday.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
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**From:** David Coombs [mailto:coombs@armycourtartialdefense.com]  
**Sent:** Tuesday, March 27, 2012 9:28 PM  
**To:** 'Lind, Denise R COL USARMY (US)'  
**Cc:** 'Matthew kemkes'; 'Bouchard, Paul R CPT USARMY (US)'; 'Santiago, Melissa S CW2 USARMY (US)'; 'Williams, Patricia CIV JFHQ-NCR/MDW SJA'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA'; 'Prather, Jay R CIV (US)'; 'Williams, Patricia CIV JFHQ-NCR/MDW SJA'; Ashden.Fein@jfhqncr.northcom.mil  
**Subject:** Government Clarification Request Re: Dept. of State

Ma'am,

With regards to the Department of State damage assessments, the Defense requests that the Court review the statement by Ambassador Kennedy before the Senate Committee on Homeland Security and Governmental Affairs. Ambassador Kennedy clearly states that the DOS has done damage assessments. Specifically, within his testimony, Ambassador Kennedy notes the following:

1) When DoD material was leaked in July 2010, the DOS worked with DoD to identify any alleged State Department material that was in WikiLeaks' possession;

2) The Department of State immediately asked Chiefs of Mission (Ambassador) at affected posts to review any purported State material in the release and provide an assessment, as well as a summary of the overall effect the WikiLeaks release could have on relations with the host country;

3) "On November 28, 2010, the State Department took the following actions: 1) Established a 24/7 WikiLeaks Working Group composed of senior officials from throughout the Department, notably our regional bureaus; 2) Created a group to review potential risks to individuals; and 3) Suspended SIPRNet access to NCD."

4) The Department of State also created a Mitigation Team to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of these documents

5) The Department of State convened two separate briefings for members of both the House of Representatives and the Senate within days (December 2, 2010) of the first disclosure by WikiLeaks and appeared twice before the House Permanent Select Committee on Intelligence (December 7 and 9, 2010).

It is important to note that following the briefings referenced in paragraph 5, officials who attended those briefings were quoted by Reuters as stating that "the administration felt compelled to say publicly that the revelations had seriously damaged American interests in order to bolster legal efforts to shut down the WikiLeaks websites and bring charges against the leakers." The same congressional official stated "we were told the impact of the WikiLeaks revelations was embarrassing but not damaging."

The issue is not whether there is a "completed" damage assessment, but whether the Department of State has done what Ambassador Kennedy testified to at the Senate hearing. If so, all this material should be either produced in accordance with paragraphs 4-6 of the Court's Order.

v/r  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
[coombs@armycourtartialdefense.com](mailto:coombs@armycourtartialdefense.com)  
[www.armycourtartialdefense.com](http://www.armycourtartialdefense.com)

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-----Original Message-----

From: Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA (<mailto:Ashden.Fein@jfhqncr.northcom.mil>)

Sent: Monday, March 26, 2012 9:31 PM

To: Lind, Denise R COL USARMY (US)

Cc: David Coombs; Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW

SJA; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA  
Subject: RE: Rulings: Motion to Compel Discovery; Amicus Curiae Filings (UNCLASSIFIED)

Ma'am,

In reference to the motion to compel discovery, the prosecution is confused by the Court's analysis in paragraph 2 on Page 10 and the ultimate order based on that analysis. As stated on/in the record, the Department of State has not completed a damage assessment. Furthermore, although the Department has monitored and continues to monitor the impact of the release of the cables discussed in Under Secretary's Kennedy's declaration in this case, the Department has not finalized an assessment of the damage to date, or over a shorter interim period of time. The Department only has a working draft that is not complete, and based on the document being a working draft, the Department has not authorized its release to any US Government agency, including the prosecution. The Court's analysis seems to group the completed assessment by the CIA's WTF with the Department's working draft. Based on no assessment or interim report existing, the prosecution is not clear with what the Court is ordering us to produce to the defense or for an in camera review.

Finally, to clarify any misunderstanding resulting from paragraph 8 on page 11, the prosecution is (was) aware of investigative files maintained by the FBI and DOS. Prior to referral, the prosecution produced the Diplomatic Security Services (investigative organization of DOS) documents, and immediately after the protective order was ordered the prosecution produced the approved documents from the classified FBI file. There are additional documents the prosecution is seeking approval to produce from the FBI and we have been working to obtain those approvals since referral. The prosecution is unclear whether the Court intended to create a broad discovery order for material outside military authorities (encompassing material we have already produced) or a specific order for that material.

Thank you.

V/r  
MAJ Fein

-----Original Message-----

From: Lind, Denise R COL USARMY (US) [mailto:denise.r.lind.mil@mail.mil]  
Sent: Friday, March 23, 2012 6:30 PM  
To: David Coombs  
Cc: Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; ashden.fein@us.army.mil; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
Subject: Rulings: Motion to Compel Discovery; Amicus Curiae Filings (UNCLASSIFIED)

Classification: UNCLASSIFIED  
Caveats: NONE

Counsel,

Attached are rulings re: Motion to Compel Discovery; Amicus Curiae Filings.

Ms. Williams please add as next AE in line.

D

Denise R. Lind

COL, JA

Chief Judge, 1st Judicial Circuit

Classification: UNCLASSIFIED

Caveats: NONE

# ATTACHMENT C

## David Coombs

---

**From:** David Coombs <coombs@armycourtartialdefense.com>  
**Sent:** Friday, March 23, 2012 6:12 PM  
**To:** 'Lind, Denise R COL USARMY (US)'  
**Cc:** 'Kemkes, Matthew J MAJ USARMY (US)'; 'Bouchard, Paul R CPT USARMY (US)'; 'Santiago, Melissa S CW2 USARMY (US)'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Overgaard, Angel M CPT USARMY (US)'; 'Whyte, Jeffrey H CPT USARMY (US)'; 'Ford, Arthur D Jr CW2 USARMY (US)'; ashden.fein@us.army.mil; 'Prather, Jay R CIV (US)'; 'Williams, Patricia A CIV (US)'; 'Fein, Ashden MAJ USARMY (US)'  
**Subject:** Touhy Request  
**Attachments:** Touhy Request - Kennedy.pdf

Ma'am,

The Defense has submitted the attached Touhy request for Ambassador Kennedy. The Government has assured the Defense that it will provide timely and meaningful access to the potential witness.

v/r  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
[coombs@armycourtartialdefense.com](mailto:coombs@armycourtartialdefense.com)  
[www.armycourtartialdefense.com](http://www.armycourtartialdefense.com)

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# The Law Office of David E. Coombs

---

The Executive Office  
Office of the Legal Adviser, Room 5519  
United States Department of State  
2201 C Street, NW  
Washington, DC 20520-6310

March 23, 2012

## Re: Touhy Request for Ambassador Patrick Kennedy

To Whom it May Concern:

This letter serves as a Touhy Request of the United States (U.S.) Department of State pursuant 22 Code of Federal Regulations (C.F.R.) Part 172, requesting the appearance and testimony of employee, Ambassador Patrick Kennedy, Under Secretary for Management, U.S. Department of State. The defense, on behalf of Private First Class Bradley Manning, requests that Ambassador Kennedy be made available for a pretrial interview on April 27, 2012, or as required thereafter until the completion of his interview.

### Background

Ambassador Kennedy provided a 51-page declaration in the matter of United States v. Private First Class Bradley Manning. The declaration documented Ambassador Kennedy's belief regarding the expected damage to national security from the disclosure of certain identified information.

### Ambassador Kennedy's Requested Testimony

Ambassador Kennedy is the Department of State employee who has the required knowledge and who can testify about the following topics:

- (1) The Net-Centric Diplomacy (NCD) database and the creation of SIPRNet Distribution (SIPDIS);
- (2) Diplomatic reporting procedures and the nature of SIPDIS cables;
- (3) The results of Chiefs of Mission review of the released cables at affected posts discussing their initial assessment, as well as their opinion regarding the overall effect that the WikiLeaks release could have on relations within their host country, if any;
- (4) The results of the WikiLeaks Working Group composed of senior officials throughout the Department that was created to review potential risks to individuals from the release of cables by WikiLeaks, if any;



(5) The "Mitigation Team" created by the Department of State to address the policy, legal, security, counterintelligence, and information assurance issues presented by the release of the documents to WikiLeaks, if any;

(6) The Department's reporting to Congress concerning any effect caused by the WikiLeaks' disclosure and the steps undertaken to mitigate them, if any. The Department convened two separate briefings for members of both the House of Representatives and the Senate in December of 2010. The Department also appeared twice before the House Permanent Select Committee on Intelligence on 7 and 9 December 2010;

(7) The removal of the NCD from SIPRNet, and its continued availability on the Joint Worldwide Intelligence Communications System (JWICS);

(8) The declaration provided by Ambassador Kennedy on October 30, 2011, including each diplomatic cable reviewed by Ambassador Kennedy for his declaration.

I request that Ambassador Kennedy appear in person to provide this testimony and that he work with the defense, if possible, to provide written responses in advance of his interview to basic background questions. I also ask that Ambassador Kennedy gather any records that would assist him in providing this testimony. The records may involve classified information. As such, the exact nature of these records is not described in any detail. However, the above description of information sought should identify the needed records in such a way that "an employee of the Department of State who is familiar with the subject area of the request can locate the records with a reasonable amount of effort." 22 C.F.R. 171.10(a) and 171.31.

#### Ambassador Kennedy's Testimony is Not Available from Another Source

Since Ambassador Kennedy is the Under Secretary of State for Management and has over 18 years of experience in classification management of national security information, security, and intelligence, he has the knowledge necessary to explain the Department's position on the nature of the released documents to WikiLeaks and the damage, if any, from such release.

The information that Ambassador Kennedy can provide through oral and written testimony is not available from any other source that is admissible at the court-martial. The Department has not issued any official records that contain the information that the defense requests from Ambassador Kennedy. Therefore, the defense needs Ambassador Kennedy's testimony or another official record of the Department in order to have this information entered into evidence at the court-martial.

#### This Touhy Request complies with 22 C.F.R. Part 172

As explained above, Ambassador Kennedy is the only known source of the information that the defense needs to present at the court-martial. Although the requested information would likely implicate Part 172.8(b)(3) and (b)(5), the request should nonetheless be authorized given the involvement of the Department in the case.

Ambassador Kennedy's testimony does not impede the Department's ability conduct its official business, create an undue burden, or prejudice any ongoing law enforcement investigation.

Costs for this Request

This Touhy Request is made on the behalf of Private First Class Manning. The defense requests that the Department waive any fee associated with this request given the fact that the United States is a party to this case.

Thank you for your consideration of this request. Please contact me directly to discuss this request or if you need any additional information. I look forward to hearing from you soon.



DAVID E. COOMBS  
Civilian Defense Counsel

Cc: Mr. John Blank  
Mr. Jason Mehta  
Major Ashden Fein

# ATTACHMENT D

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Wednesday, March 28, 2012 9:28 AM  
**To:** Lind, Denise R COL MIL USA OTJAG  
**Cc:** David Coombs; Matthew kemkes; Bouchard, Paul R CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; Prather, Jay R CIV (US); Williams, Patricia CIV JFHQ-NCR/MDW SJA  
**Subject:** RE: Government Clarification Request Re: Dept. of State

Ma'am,

The United States disagrees with the defense's interpretation of this document and its reliance on anonymous government officials making unofficial statements to the press. We would like the opportunity to discuss at the telephonic RCM 802 conference today.

v/r  
MAJ Fein

-----Original Message-----

**From:** David Coombs [mailto:coombs@armycourt martialdefense.com]  
**Sent:** Wednesday, March 28, 2012 9:14 AM  
**To:** Lind, Denise R COL MIL USA OTJAG  
**Cc:** Matthew kemkes; 'Bouchard, Paul R CPT USARMY (US)'; 'Santiago, Melissa S CW2 USARMY (US)'; Williams, Patricia CIV JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; 'Prather, Jay R CIV (US)'; Williams, Patricia CIV JFHQ-NCR/MDW SJA; Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Government Clarification Request Re: Dept. of State

Ma'am,

My previous attempt to send this email may not have gotten through due to the word WL being in the body of the message. I have now made the needed changes to the my original message the starts below:

With regards to the Department of State damage assessments, the Defense requests that the Court review the statement by Ambassador Kennedy before the Senate Committee on Homeland Security and Governmental Affairs. Ambassador Kennedy clearly states that the DOS has done damage assessments. Specifically, within his testimony, Ambassador Kennedy notes the following:

1) When DoD material was leaked in July 2010, the DOS worked with DoD to identify any alleged State Department material that was in WL's possession;

# ATTACHMENT E

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Monday, April 09, 2012 11:35 AM  
**To:** David Coombs  
**Cc:** joshua.j.tooman.mil@mail.mil; matthew.j.kemkes.mil@mail.mil;  
melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA;  
Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; paul.r.bouchard.mil@mail.mil;  
Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-  
NCR/MDW SJA  
**Subject:** Touhy Update

David,

On Friday, we received an update from the Department of State that the Office of the Legal Adviser received your request and is processing it through the appropriate channels. I will send an update as I receive them. Do you still intend to submit the other request to the federal agency?

v/r  
Ashden

## David Coombs

---

**From:** David Coombs <coombs@armycourtartialdefense.com>  
**Sent:** Monday, April 09, 2012 12:24 PM  
**To:** 'Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA'  
**Cc:** joshua.j.tooman.mil@mail.mil; matthew.j.kemkes.mil@mail.mil;  
melissa.s.santiago.mil@mail.mil; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA';  
'Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA'; paul.r.bouchard.mil@mail.mil;  
'Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA'; 'Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA'  
**Subject:** RE: Touhy Update

Ashden,

This was Fed-Ex'd two weeks ago. All that the DOS has done is confirmed receipt? I plan to submit additional Touhy requests.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
[coombs@armycourtartialdefense.com](mailto:coombs@armycourtartialdefense.com)  
[www.armycourtartialdefense.com](http://www.armycourtartialdefense.com)

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**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA [<mailto:Ashden.Fein@jfhqncr.northcom.mil>]  
**Sent:** Monday, April 09, 2012 11:35 AM  
**To:** David Coombs  
**Cc:** joshua.j.tooman.mil@mail.mil; matthew.j.kemkes.mil@mail.mil; melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; paul.r.bouchard.mil@mail.mil; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** Touhy Update

David,

On Friday, we received an update from the Department of State that the Office of the Legal Adviser received your request and is processing it through the appropriate channels. I will send an update as I receive them. Do you still intend to submit the other request to the federal agency?

## David Coombs

---

**From:** David Coombs <coombs@armycourt martialdefense.com>  
**Sent:** Friday, April 13, 2012 5:57 PM  
**To:** Ashden.Fein@jfhqncr.northcom.mil; 'Overgaard, Angel M CPT USARMY (US)'; 'Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA'; 'Whyte, Jeffrey H CPT USARMY (US)'; Alexander.VonElten@jfhqncr.northcom.mil  
**Cc:** 'Tooman, Joshua J CPT USARMY (US)'  
**Subject:** Discovery

Ashden,

I received the unclassified discovery today. Also, the classified discovery was received by NWC. I have arranged to see the facility next week at the NWC.

I have a couple of questions that I would like to have answers to:

- 1) With regards to the unclassified damage assessments provided in discovery, when did the Government receive these documents?
- 2) Are there any more unclassified damages assessments in the Government's possession?
- 3) Do you have an update on the 14 hard drives?
- 4) Who is the Government bringing from the Department of State for the motions hearing? Can you provide this person's contact information?
- 5) Are you planning on providing me with your proposed LIOs? If so, perhaps this is something we can agree upon.
- 6) Did you receive the emails from COL Lind regarding her email problems?
- 7) I have forwarded the documentation regarding badges for my family. Has Mr. Parra heard anything on that issue?
- 8) Has the DOS provided any further updates on my Touhy request?
- 9) When does the Government plan to have PFC BM in the Fort Meade area? Additionally, is the plan to return him to the JRCF immediately after the 39(a) is completed? The Defense's preference would be to return PFC BM to military control at the JRCF.

Thank you for your attention to the above matters.

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs



11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
[coombs@armycourtartialdefense.com](mailto:coombs@armycourtartialdefense.com)  
[www.armycourtartialdefense.com](http://www.armycourtartialdefense.com)

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## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Monday, April 16, 2012 5:48 PM  
**To:** David Coombs; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonEiten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA  
**Cc:** Tooman, Joshua J CPT USARMY (US); melissa.s.santiago.mil@mail.mil  
**Subject:** RE: Discovery

David,

Below are our responses to the applicable questions. The others should be OBE or subject to other emails today.

- 1) The prosecution has been working with many government agencies pursuant to our obligation to search for discoverable information under Williams. As we identify discoverable information, we seek approvals to release the information. Over the past few weeks, we reviewed these particular assessments; identified discoverable information contained within, obtained approvals to release them, and produced them to the defense as soon as possible.
  - 2) The prosecution continues to review additional unclassified assessment(s), and will diligently work to obtain approvals to turn the discoverable portions, if any, over in discovery.
  - 4) The United States will notify you of the individual, once we receive the information. We expect this decision in the next few days. Additionally, we will work to provide you contact information for the individual and/or setup a time prior to the motions hearing for you to interview the individual.
  - 5) I am confident we can work on this as we move forward, but we are not in a position to send any as of yet. We will address this issue after the next motions hearing.
  - 7) I will check with Mr. Parra about this issue.
  - 8) The Department of State is processing your Touhy request and we were told that they might have an answer by the end of this week.
  - 9) Please see your previous email at the very bottom.
- A) Defense expert witnesses. We should be able to give you a comprehensive answer on the status of funding for your experts and their contract issues by Wednesday, as per my email last week. Once CW2 Parra returns this is his priority. They are currently funded for their travel tomorrow. SGT Feito is making their reservations and has been trying to contact them.
- B) OCA POCs.
1. Rear Admiral David Woods (CDR Thomas Welsh, SJA, JTF-GTMO, Thomas.J.Welsh@jtfgtmo.southcom.mil)
  2. LT Gen Schmidle (LTC Lisa Gumbs, OSJA, CYBERCOM at lgumbs@nsa.gov)
  3. Vice Admiral Robert Harward (should obtain tomorrow)
  4. Rear Admiral Donegan (should obtain tomorrow)

v/r  
Ashden

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Tuesday, May 15, 2012 3:14 PM  
**To:** David Coombs; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA  
**Cc:** Tooman, Joshua J CPT USARMY (US); Hurley, Thomas F MAJ USARMY (US); Santiago, Melissa S CW2 USARMY (US)  
**Subject:** RE: Discovery

David,

We asked this morning and they should be getting back to us in the next day or two with an update.

v/r  
Ashden

-----Original Message-----

**From:** David Coombs [mailto:coombs@armycourt martialdefense.com]  
**Sent:** Tuesday, May 15, 2012 3:09 PM  
**To:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA  
**Cc:** 'Tooman, Joshua J CPT USARMY (US)'; Hurley, Thomas F MAJ USARMY (US); Santiago, Melissa S CW2 USARMY (US)  
**Subject:** RE: Discovery

MAJ Fein,

Do you have any update on the DoS Touhy request?

Best,  
David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906  
Toll Free: 1-800-588-4156  
Local: (508) 689-4616  
Fax: (508) 689-9282  
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www.armycourt martialdefense.com

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# ATTACHMENT F

## David Coombs

---

**From:** Lind, Denise R COL USARMY (US) <denise.r.lind.mil@mail.mil>  
**Sent:** Tuesday, April 17, 2012 2:00 PM  
**To:** Fein, Ashden MAJ USARMY (US)  
**Cc:** coombs@armycourtmartrialdefense.com; Ford, Arthur D Jr CW2 USARMY (US); Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S. 1LT USA JFHQ-NCR\MDW SJA; Jefferson, Dashawn MSG USARMY (US); Williams, Patricia A CIV (US)  
**Subject:** US v. PFC BM - Ruling on Gov't Request - Leave to Respond; Article 39(a); and trial calendar (UNCLASSIFIED)  
**Attachments:** 120413-Motion for Leave.pdf; document2012-04-16-145110.pdf; Draft Update Calendar final16 April 12.docx  
**Signed By:** denise.lind@us.army.mil

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

1. Attached please find the Court's ruling granting the Government motion for Leave to Respond. The original motion is also attached. I will try to add the ruling to the FTP to see how it works. Ms. Williams, please add the motion and ruling as the next AE in line (do not add the draft calendar discussed in (3) below).
2. For the Article 39(a) session starting Tues, 24 April, we will meet in chambers for an RCM 802 conference at 0900 and go on the record at 1000. I would like to handle all of the outstanding discovery issues on Tuesday. Both sides have advised me that there will be witnesses - forensics POCs for the hard drive issue, and state department POC for the damage assessment issue. Please confer and confirm that all witnesses/evidence for discovery issues will be available Tuesday.
3. Case calendar. I have the parties' input on the case calendar. Tuesday afternoon, we will meet in chambers to finalize it (subject to review every 30 days). Please review the attached (very rough) draft as a baseline with trial scheduled 20 September - 15 October 2012. Certain motions that do not involve classified information are moved up in the schedule (article 13 and speedy trial to July) and classified/unclassified issues are not severed in the Article 39(a) sessions. We currently have "replies" built in to the calendar. They shouldn't be necessary for motions addressed shortly before trial per the draft schedule.

D

Denise R. Lind  
COL, JA  
Chief Judge, 1st Judicial Circuit

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Friday, April 20, 2012 7:29 PM  
**To:** Lind, Denise R COL MIL USA OTJAG  
**Cc:** David Coombs; Tooman, Joshua J CPT USARMY (US); melissa.s.santiago.mil@mail.mil; Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA; Jefferson, DaShawn MSG MIL USA OTJAG  
**Subject:** DOS Witness Follow-on

Your Honor,

This email is a follow-on to our previous email referencing the production of a Department of State (DOS) witness for our upcoming motions hearing.

The DOS will authorize the prosecution to submit, in camera and ex parte, the classified draft assessment along with an explanation of the draft, for the Court's review. The prosecution anticipates receiving these documents within the next week. The DOS has asked the prosecution to readdress with the Court the issue of whether its draft assessment is discoverable based on the proposed filing.

The prosecution maintains that the draft damage assessment is not discoverable under RCM 701(a)(6) or Brady, because it is a mere draft. See Giles. Pending your consideration of the above request, the prosecution will continue its efforts to review the information contained in the assessment under RCM 701(a)(6) and Brady, to ensure that there would be no delay in meeting a May 18 deadline.

v/r  
MAJ Fein

# ATTACHMENT G

## David Coombs

---

**From:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA <Ashden.Fein@jfhqncr.northcom.mil>  
**Sent:** Friday, June 01, 2012 7:36 PM  
**To:** David Coombs  
**Cc:** Hurley, Thomas F MAJ USARMY (US); Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M. CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H. CPT USA JFHQ-NCR/MDW SJA; von Elten, Alexander S. CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D. CW2 USA JFHQ-NCR/MDW SJA  
**Subject:** RE: Security Expert  
**Attachments:** Security Expert Memo.docx; 110114-SPCMCA Approval Defense Expert in IA Smith.pdf; 101012-Appointment of 2d Defense Security Expert Hall.pdf; 101028-Defense Request for IA Expert.pdf; 100928-Defense Request for 2d Security Expert.pdf; 100917-Appointment of Defense Security Expert.pdf

David,

Based on your request, we reached out to the different chains of command of the experts to receive input, including Ms. Smith's. We have realized that each of the defense's referenced experts were appointed approximately 1.5 years ago, and as you know were appointed as expert consultants in their respective fields. See Requests and Appointment documents. Based on the draft memorandum you provided, it appears that their jobs have morphed since their original appointment as consultants.

We recommend that you turn your draft memorandum into a request to the GCMCA for reappointment. This request should reflect the scope of the responsibilities you anticipate these experts will provide, the reasons why these experts are necessary, an estimate of how much time their obligation to the defense team will take, and request their position as a defense expert consultant take priority over all other work. We will take this request to their chains of commands, obtain approval / disapproval / support, and then route it to the GCMCA for action.

Once we receive the requests, we will start routing them immediately. This should be sufficient to ensure that the defense is receiving the proper support and the right person is providing that support based on the scope. Additionally, we can ensure that they will not have any difficulty with their respective chains of command by having the commands sign-off on the reappointment.

Please let me know if you have any questions/concerns.

V/r  
Ashden

-----Original Message-----

**From:** David Coombs [<mailto:coombs@armycourt martialdefense.com>]  
**Sent:** Wednesday, May 30, 2012 2:58 PM  
**To:** Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
**Cc:** Hurley, Thomas F MAJ USARMY (US)  
**Subject:** Security Expert

Ashden,



As discussed in today's 802 hearing, our experts are frequently tasked to perform other duties by their respective commands. These duties result in them not being available to perform their duties as defense experts. I have just finished speaking with them about this issue.

Mr. Hall and Mr. Ganiel have asked me to obtain a court order or memorandum from COL Lind that they can use to show to their individual directors to avoid future conflicts. I told them that I didn't believe COL Lind needed to weigh in on the issue, and that it was something that the convening authority could resolve with memorandum similar to his appointment memorandum. I have typed up a memorandum that I believe should avoid future availability issues.

If our experts continue to have difficulty with their respective chain of commands after the memorandum, then the Defense would request direct contact with the chain of command on this issue with defense counsel being present. Let me know if you have any questions.

Best,

David

David E. Coombs, Esq.  
Law Office of David E. Coombs  
11 South Angell Street, #317  
Providence, RI 02906

Toll Free: 1-800-588-4156

Local: (508) 689-4616

Fax: (508) 689-9282  
[coombs@armycourt martialdefense.com](mailto:coombs@armycourt martialdefense.com)  
<<mailto:coombs@armycourt martialdefense.com>>

[www.armycourt martialdefense.com](http://www.armycourt martialdefense.com) <<http://www.armycourt martialdefense.com/>>

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DEPARTMENT OF THE ARMY  
JOINT BASE MYER-HENDERSON HALL  
204 LEE AVENUE  
FORT MYER, VIRGINIA 22211-1199

REPLY TO  
ATTENTION OF:

IMND-MHH-ZA

30 May 2012

MEMORANDUM FOR Mr. David E. Coombs, Civilian Defense Counsel

SUBJECT: Duties as Defense Security Experts – U.S. v. PFC Bradley Manning

On 17 September 2010 and 12 October 2010, I appointed Mr. Charles Ganiel, U.S. Army Test and Evaluation Command and Mr. Cassius Hall, U.S. Army Intelligence and Security Command, as expert consultants for the defense in the above-named case. I also designated both individuals as members of the defense team under U.S. v. Toledo, 25 M.J. 270 (C.M.A. 1987) and Military Rule of Evidence 502. This Expert appointment was at no expense to the United States beyond mileage reimbursement, if applicable.

Mr. Ganiel and Mr Hall's obligations as security experts for the defense include, reviewing motions and other materials for classified information; accompanying defense counsel on witness interviews where classified information may be discussed; accompanying defense counsel whenever required to do so in order to view classified information provided to the defense in discovery; being present in the courtroom during any session; and acting as expert consultants or if the defense wishes, expert witnesses for the defense. This duty takes precedence over Mr. Ganiel and Mr. Hall's normal duties.

CARL R. COFFMAN, JR.  
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Commanding

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### GOVERNMENT MOTION FOR APPROPRIATE RELIEF: PROPOSED LESSER-INCLUDED OFFENSES

10 May 2012

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court adopt the Government's proposed lesser-included offenses prior to trial.

As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. *Manual for Courts-Martial (MCM), United States*, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

The United States proposes the following possible lesser-included offenses for Specifications 2-16 of Charge II [Offenses charged under Clause 3 of Article 134, UCMJ]:

- A. Clauses 1 and 2 of Article 134, UCMJ  
B. Attempts under Article 80, UCMJ

The United States proposes the following possible additional lesser-included offense for Specifications 4, 6, 8, 12, and 16 of Charge II [Violations of 18 U.S.C. §641]:

- A. Value of [record][thing of value] less than \$1,000

The United States requests the Court consider the referred charge sheet in support of its motion.

## LEGAL AUTHORITY AND ARGUMENT

Article 79, Uniform Code of Military Justice (UCMJ), states that “[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.” UCMJ art. 79 (2008). To determine whether an offense is necessarily included in the offense charged, the Court of Appeals for the Armed Forces (CAAF) applies the “elements” test. *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011); see also *United States v. Jones*, 68 M.J. 465, 468 (C.A.A.F. 2010). The elements test compares the elements of each offense. “If all of the elements of offense X are also elements of offense Y, then X is [a lesser-included offense] of Y.” *Jones*, 68 M.J. at 470. The greater and lesser offenses do not need to “employ identical statutory language.” *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). “Instead, the meaning of the offenses is ascertained by applying the ‘normal principles of statutory construction.’” *Id.* (citing *Carter v. United States*, 530 U.S. 255, 263 (2000)).

### I. OFFENSES UNDER CLAUSES 1 AND 2 OF ARTICLE 134 ARE LESSER-INCLUDED OFFENSES OF SPECIFICATIONS 2 THROUGH 16 OF CHARGE II, AS DRAFTED BY THE UNITED STATES.

Offenses arising under clauses 1 and 2 of Article 134, UCMJ, are lesser-included offenses of Specifications 2-16 of Charge II because the elements of offenses under clauses 1 and 2 are necessarily included in the elements of Specifications 2-16, as drafted in this case. In *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008), CAAF had the opportunity to address whether an offense arising under clauses 1 and/or 2 of Article 134, UCMJ, depending on the facts, necessarily stands as an included offense to an offense arising under clause 3 of Article 134, UCMJ. *Id.* at 25. The court compared the elements of clauses 1 and 2 with the elements of clause 3 and concluded that the elements of clauses 1 and 2 were not textually contained within the clause 3 offense charged in the case.<sup>1</sup> *Id.* However, the court ultimately held that although clauses 1 and 2 are not necessarily lesser-included offenses of clause 3 offenses, they may be lesser-included offenses *depending on the drafting of the specification*. *Id.* at 26.

In this case, the United States has charged the accused with violations of Federal law in Specifications 2-16 of Charge II under clause 3 of Article 134, UCMJ. See Charge Sheet. In these specifications, each element of the applicable Federal law is expressly alleged, in accordance with the drafting guidance in the *MCM*. *MCM* pt. IV, ¶60.c.(6)(b). Additionally, the clause 3 specifications include the additional element that the conduct was “prejudicial to good order and discipline in the armed forces” and “of a nature to bring discredit upon the armed forces.” See Charge Sheet. As such, the United States has made clauses 1 and 2 of Article 134 lesser-included offenses of Specifications 2-16 by including the second element of the clause 1 and 2 offenses in the specifications, as described by the court in *Medina*. See *Medina*, 66 M.J. at

<sup>1</sup> Clauses 1 and 2 of Article 134, UCMJ, require two elements of proof: (1) That the accused did or failed to do certain acts; and (2) That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. If conduct is punished as a crime or offense not capital under clause 3, the proof must establish every element of the crime or offense as required by the applicable law. *MCM* pt. IV, ¶60.b.

26. This is true even if the first element of proof under clause 1 and 2 (“That the accused did or failed to do certain acts”) does not employ identical statutory language to the applicable Federal law in Specifications 2-16 under the elements test. *See Alston*, 69 M.J. at 216. At least one element of each Federal offense (e.g. “That the accused willfully communicated information related to the national defense” under 18 U.S.C. § 793(e)) is the functional equivalent of “that the accused did...certain acts” under clauses 1 and 2. Thus, the two elements of proof for a clause 1 and 2 offense are a subset of the elements of proof for Specifications 2-16 of Charge II, as drafted by the United States in this case—making clauses 1 and 2 lesser-included offenses.

II. AN ATTEMPT TO COMMIT THE OFFENSE CHARGED IS A LESSER-INCLUDED OFFENSE.


It is well-settled that an attempt to commit the charged offense is a lesser-included offense. *See United States v. Brown*, 63 M.J. 735, 737 (C.A.A.F. 2006); *see also* UCMJ art. 79 (2008) (stating that “[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.”) (emphasis added). An attempt to commit any of the offenses alleged in Specifications 2-16 of Charge II is a lesser-included offense.

III. STEALING, PURLOINING, OR KNOWINGLY CONVERTING GOVERNMENT PROPERTY WORTH LESS THAN \$1,000 IS A LESSER-INCLUDED OFFENSE OF SPECIFICATIONS 4, 6, 8, 12, AND 16 OF CHARGE II.


Specifications 4, 6, 8, 12, and 16 of Charge II allege that the accused stole, purloined, or knowingly converted government property worth more than \$1,000, in violation of 18 U.S.C. § 641. *See* Charge Sheet. Under these specifications, the value of the government property is an element of the offenses. *See Carter*, 530 U.S. at 272-73 (rejecting argument that “value exceeding \$1,000” under 18 U.S.C. § 2113(b) is a sentencing factor rather than an element). Using the elements test employed by CAAF in *Arriaga* to determine lesser-included offenses, it is clear that stealing or knowingly converting government property worth less than \$1,000 is a lesser-included offense. If the value element is eliminated in Specifications 4, 6, 8, 12, and 16, a cognizable offense constituting a subset of elements still remains—a violation of 18 U.S.C. § 641. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989) (“One offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense.”). Thus, stealing, purloining, or knowingly converting government property worth less than \$1,000 is a lesser-included offense of Specifications 4, 6, 8, 12, and 16 of Charge II.

CONCLUSION

The United States respectfully requests the Court adopt the Government's proposed lesser-included offenses.

  
JODEAN MORROW  
CPT, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 10 May 2012.

  
JODEAN MORROW  
CPT, JA  
Trial Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, xxx-xx-[REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE MOTION FOR  
INSTRUCTIONS ON LESSER  
INCLUDED OFFENSE (LIO)**

DATED: 10 May 2012

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law, Article 79, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 879 (2010), and Rule for Courts Martial (R.C.M.) 920(e)(2), requests this Court to instruct the members on the elements of Article 92(1) for a violation of Army Regulation 380-5 (AR 380-5) as a lesser included offense (LIO) of each of the offenses alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. The Defense, as the moving party, bears the burden of this motion by a preponderance of the evidence pursuant to R.C.M. 905(c)(1) and (2)(A).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934.

4. Specifically, in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with unauthorized possession and disclosure of information relating to the national defense in violation of 18 U.S.C. Section 793(e). *See* Charge Sheet. In addition, each of these specifications allege that the conduct described therein is prejudicial to good order and discipline in the armed forces and is of a nature to bring discredit upon the armed forces, in violation of Article 134. *See id.* Finally, Specification 1 of Charge II charges PFC Manning with wrongfully

and wantonly causing United States intelligence to be published on the internet, having knowledge that the intelligence placed on the internet is accessible to the enemy, in violation of Article 134. *See id.*

5. Additionally, as stated by this Court in the “Factual Findings” section of its Ruling on the Defense’s Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense, “[a]t the time of PFC Manning’s alleged unlawful actions, Army Regulation 380-5 (Department of the Army Information Security Program) was in effect. The regulation is a punitive lawful general order per paragraph 1-21[.]” *See* Appellate Exhibit LXXX at 1.

#### WITNESSES/EVIDENCE

6. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the following evidence in support of the Defense’s motion:

- a. Charge Sheet
- b. Army Regulation 380-5.

#### LEGAL AUTHORITY AND ARGUMENT

7. Article 79 provides that “[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.” 10 U.S.C. § 879. To determine whether an offense is “necessarily included” in a charged offense, *id.*, the Court of Appeals for the Armed Forces has adopted the “elements test.” *See United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011); *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011); *United States v. Jones*, 68 M.J. 465, 468, 470-71 (C.A.A.F. 2010). Under the elements test, “one offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense.” *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (quoting *Schmuck v. United States*, 489 U.S. 705, 716 (1989)); *see Bonner*, 70 M.J. at 2.

8. Analysis under the elements test begins by identifying and comparing the elements of the charged offense and the purported LIO:

[O]ne compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.

*Jones*, 68 M.J. at 470. However, “[t]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the ‘normal principles of statutory construction.’” *Alston*, 69 M.J. at 216 (quoting



*Carter v. United States*, 530 U.S. 255, 263 (2000)); *see Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2.

9. Additionally, identification of the elements of the offenses under the elements test need not rely solely on the statutory text in the abstract, untethered to any consideration of how the offenses are charged in the particular case at hand. On the contrary, the Court of Appeals for the Armed Forces has made clear that “comparison of the statutory elements *as charged in the specification* is allowed.” *Arriaga*, 70 M.J. at 54 (emphasis supplied); *see id.* at 55 (“Regardless of whether one looks strictly to the statutory elements *or to the elements as charged*, housebreaking is a [LIO] of burglary . . . . [T]he offense *as charged in this case* clearly alleges the elements of both offenses.” (emphases supplied)); *see also United States v. Nealy*, 71 M.J. 73, \_\_\_, No. 11-0615, 2012 WL 1108134, at \*7-8 & n.1 (C.A.A.F. March 30, 2012) (Baker, C.J., concurring in the result) (explaining that, under *Arriaga*, the specification itself may provide notice to an accused of the LIOs of the charged offense(s)); *Alston*, 69 M.J. at 216 (examining the elements as charged in the specification when conducting an elements test analysis).

10. Consideration of the elements of the offenses as charged is completely consistent with *Jones*. In *Jones*, the Court explained that the paramount concern of the elements test was ensuring that an accused has notice of the LIOs of which he could be convicted. *See* 68 M.J. at 468. The *Jones* Court made clear that the specification in any particular case could provide that notice: “[W]hat is general [in the statutory text of Article 134] is made specific through the language of a given specification. The charge sheet itself gives content to that general language, thus providing the required notice of what an accused must defend against.” *Id.* at 472. In fact, the Government itself has recently acknowledged that the court can properly consider how offenses are alleged in the specification in making LIO determinations under the elements test. *See* Brief for Appellee United States, *United States v. Nealy*, 71 M.J. 73 (No. 11-0615), 2011 WL 5358403, at \*7-10 (C.A.A.F. Oct. 25, 2011) (discussing continued vitality of the pleadings-elements test of *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995), even after *Jones*); *id.* at \*8 (“*Jones* . . . implicitly acknowledges reliance upon the ‘pleadings-elements’ test to ascertain the elements in any particular case.”); *id.* at \*9 (“[T]he ‘elements’ of any given offense cannot be based solely upon what Congress enacted, but must also include the specific pleading in any particular case.”); *id.* at \*10-12 (explaining how provoking speeches or gestures under Article 117 may be a LIO of communicating a threat under Article 134. “[d]epending on the [n]ature of the [a]llegation”).

11. In the last analysis, the elements test is the approach used to determine whether one offense is a “subset” of another. *See Schmuck*, 489 U.S. at 716; *Bonner*, 70 M.J. at 2; *Jones*, 68 M.J. at 469. Where it is impossible to commit the greater offense without also committing the purported LIO, the elements test has been satisfied. *See Schmuck*, 489 U.S. at 719 (“To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.” (quoting *Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944)) (internal quotations omitted)); *Arriaga*, 70 M.J. at 55 (holding that housebreaking is a LIO of burglary because “it is impossible to prove a burglary without also proving a housebreaking.”).

12. When a LIO is reasonably raised by the evidence, the court must instruct the members on the elements of that LIO. See R.C.M. 920(e)(2) (“Instructions on findings shall include: . . . (2) A description of the elements of each lesser included offense in issue”; *Arriaga*, 70 M.J. at 55 (“A military judge has a sua sponte duty to instruct the members on lesser included offenses reasonably raised by the evidence.” (quoting *United States v. Upham*, 66 M.J. 83, 87 (C.A.A.F. 2008))); *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011) (“[U]nder R.C.M. 920(e)(2), the military judge ha[s] a sua sponte duty to instruct the court members on LIOs under the prevailing law”); *Jones*, 68 M.J. at 468 (“[M]ilitary judges must instruct the members on LIOs reasonably raised by the evidence”).

13. In the instant case, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for each of the offenses alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. Accordingly, the Defense requests that this Court instruct the members of the elements of this LIO. See *Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.

**A. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Each Specification Charging PFC Manning with a Violation of 18 U.S.C. Section 793(e) and Article 134**

14. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, PFC Manning is charged with violations of Section 793(e) and Article 134. See Charge Sheet. Under the elements test analysis, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for each of these specifications.

15. The first step in an elements test analysis is to identify the elements of each offense. See *Jones*, 68 M.J. at 470; *Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2. In Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, the Government has used the third clause of Article 134 to charge violations of Section 793(e). See 10 U.S.C. § 934 (“crimes and offenses not capital” clause). In general, “[i]f the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law[.]” Manual for Courts-Martial (MCM), Part IV, para. 60.b – here, Section 793(e). In this case, though the specific date ranges and the particular information at issue vary, the core elements of Section 793(e), charged as a violation of the third clause of Article 134, are identical in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. See *Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis); see also *Nealy*, 2012 WL 1108134, at \*7-8 & n.1 (Baker, C.J., concurring in the result) (same). Those core elements are as follows:

(1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about [varying date ranges], had unauthorized possession of information;

(2) The information was relating to the national defense, to wit: [the named information];

(3) The accused knew or had reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation;

(4) The accused willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted the information to a person not entitled to receive it; and

(5) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

See Charge Sheet; *see also* 10 U.S.C. § 934 (containing statutory text supporting element 5 above); 18 U.S.C. § 793(e) (containing statutory text supporting elements 1-4 above).

16. A violation of AR 380-5 charged under Article 92(1) would have the following elements:

(1) There was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;

(2) The accused had a duty to obey this regulation; and

(3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

See MCM, Part IV, para. 16.b(1); *see also* 10 U.S.C. § 892(1); AR 380-5, para. 1-21(a)(1).

17. After the elements have been identified, the next step in an elements test analysis is to compare the elements of the two offenses to determine whether the elements of one offense are "necessarily included" in the other. *See Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2; *Alston*, 69 M.J. at 216; *Jones*, 68 M.J. at 470. This comparison "does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the 'normal principles of statutory construction.'" *Alston*, 69 M.J. at 216 (quoting *Carter*, 530 U.S. at 263); *see Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2.

18. In this case, each of the elements of the Article 92(1) offense is necessarily included in one or more elements of the Article 134 offense charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. As all of the elements of the Article 92(1) offense are necessarily included in the Article 134 offense, the Article 92(1) offense is a LIO of the Article 134 offense.

19. Taking the elements in order, elements one and two of the Article 92(1) offense (existence of the lawful general regulation and accused's duty to obey it) are necessarily included in the first element of the Section 793(e) offense (the accused's unauthorized possession of information). The lawful general regulation – AR 380-5 – covers the handling of classified and

sensitive information. See AR 380-5, para. 1-1 ("This regulation establishes the policy for the classification . . . transmission, transportation, and safeguarding of information requiring protection in the interests of national security. It primarily pertains to classified national security information, now known as classified information, but also addresses controlled unclassified information, to include for official use only and sensitive but unclassified."). The regulation prohibits, among other things, "[c]ollecting, obtaining, recording, or removing, for any personal use whatsoever, of any material or information classified in the interest of national security[.]" *Id.*, para. 6-1. Any "unauthorized possession of information" relating to the national defense must necessarily implicate the duties imposed by AR 380-5. In other words, the duty to obey the regulation on handling classified and sensitive information imposed by AR 380-5 (the first two elements of the Article 92(1) offense) is a subset of the unauthorized possession of each charged Section 793(e) violation (the first element of the Section 793(e) offense). Thus, the first two elements of the Article 92(1) offense are necessarily included in the first element of the Section 793(e) offense.

20. Additionally, the third element of the Article 92(1) offense (violation of AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to a person not authorized to receive it under paragraph 1-21 of the regulation) is necessarily included in the fourth element of the Section 793(e) offense (willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted information relating to the national defense to a person not entitled to receive it). Indeed, the third element of the Article 92(1) offense and the fourth element of the Section 793(e) offense are nearly identical, and the statutory language of the offenses need not mirror each other perfectly. See *Alston*, 69 M.J. at 216; see *Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2. While the Article 92(1) offense can be committed by a knowing, willful, or negligent disclosure, the inclusion of "knowingly" and "negligently" in this element is of no moment because "[t]he fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" *Arriaga*, 70 M.J. at 55 (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003)). In this case, each of the willful communications, deliveries, or transmissions of information relating to the national defense to a person not entitled to receive it alleged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II necessarily included a willful disclosure of classified or sensitive information to a person not authorized to receive it. The specific information related to the national defense identified in Specifications 3, 5, 7, 9, 10 and 15 of Charge II is alleged to be classified. See Charge Sheet. The information identified in Specifications 2 and 11 of Charge II, though not alleged to be classified, readily fits the definition of either "classified information" or "sensitive information," as those terms are used in AR 380-5. See *id.*; AR 380-5. Additionally, the conduct alleged in each of these specifications involved a willful disclosure of the information to a person not authorized to receive it. Therefore, the third element of the Article 92(1) offense is necessarily included in the fourth element of the Section 793(e) offense.

21. Moreover, the first two elements of the Article 92(1) offense are also necessarily included in the fifth element of the Section 793(e) offense, as the Government has charged that offense in this case. The Government has used clause 3 of Article 134 to charge the Section 793(e) offense and has alleged that the conduct underlying the Section 793(e) violation was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed

forces. *See* Charge Sheet. The alleged conduct that is to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces also, as it is alleged by the Government, necessarily includes a violation of the duty to obey the regulation on handling classified information. As the MCM instructs:

A breach of a custom of the service may result in a violation of clause 1 of Article 134 . . . . Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive.

MCM, Part IV, para. 60.c(2)(B); *see* Appellate Exhibit LXXX at 4 (“Violations of customs of the service that are made punishable in punitive regulations should be charged under Article 92 as violations of the regulations in which they appear.”). So it is here. The conduct that the Government alleges was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces – a Section 793(e) violation – necessarily included a breach of a custom of the service now set forth in a punitive regulation – AR 380-5. As the violation of the regulation is necessarily included in the conduct underlying the Section 793(e) violation, the duty to obey the regulation is also included in that conduct. Thus, the first two elements of the Article 92(1) offense are also necessarily included in the fifth element of the Section 793(e) offense, as the Government has charged that offense in this case.

22. In sum, because every element of the Article 92(1) offense is necessarily included in one or more elements of the Section 793(e) offense, as charged under clause 3 of Article 134, the Article 92(1) offense is a subset of the Section 793(e) offense. Every violation of Section 793(e) perpetrated by a member of the Army must, of necessity, include a violation of AR 380-5. It is impossible for a member of the Army to violate Section 793(e) in the manner alleged by the Government, *see Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. *See Schmuck*, 489 U.S. at 719 (explaining that when it is impossible to commit the greater offense without also committing the lesser offense, the lesser offense is a LIO); *Arriaga*, 70 M.J. at 55 (similar); *see also United States v. Baba*, 21 M.J. 76, 78 (C.M.A. 1985) (Cox, J., concurring in the result) (“The elements of an offense under Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 . . . are necessarily included in the elements of an offense under Article 134, UCMJ, 10 U.S.C. § 934, and 18 U.S.C. § 793(d).”).

23. Thus, a violation of AR 380-5 charged under Article 92(1) is a LIO of each Section 793(e) violation charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. Accordingly, this Court should instruct the members on the elements of the Article 92(1) LIO for each of these specifications. *See Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.

**B. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Specification 1, of Charge II**

24. In Specification 1 of Charge II, PFC Manning is charged with wrongfully and wantonly causing United States intelligence to be published on the internet, having knowledge that the

intelligence placed on the internet is accessible to the enemy, in violation of Article 134. See Charge Sheet. Under the elements test analysis, a violation of AR 380-5, chargeable under Article 92(1), is a LIO for this specification.

25. Specification 1 of Charge II charges a violation of Article 134 under the first and second clauses of that article. See 10 U.S.C. § 934 (the “all disorders and neglects to the prejudice of good order and discipline in the armed forces” clause and the “all conduct of a nature to bring discredit upon the armed forces” clause). In general, conduct punished under clause 1 and 2 of Article 134 requires proof of the following elements:

- (1) That the accused did or failed to do certain acts; and
- (2) That, under the circumstances, the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM, Part IV, para. 60.b. In this case, the elements of the clause 1 and 2 Article 134 offense are alleged in the specification, *see Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis), as follows:

- (1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy; and
- (2) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

See Charge Sheet. A violation of AR 380-5 charged under Article 92(1) would have the same elements as outlined above, *see Argument*, Part A, *supra*, namely:

- (1) There was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;
- (2) The accused had a duty to obey this regulation; and
- (3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

See MCM, Part IV, para. 16.b(1); *see also* 10 U.S.C. § 892(1); AR 380-5, para. 1-21(a)(1).

26. Comparing the elements of these two offenses, the first and second elements of the Article 92(1) offense (existence of lawful general order or regulation and the accused's duty to obey it) are necessarily included in the second element of the clause 1 and 2 Article 134 offense (conduct of the accused to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces). The Government has alleged that wrongfully and wantonly causing intelligence to be published on the internet is the conduct that is prejudicial to good order and discipline and service discrediting. That same conduct, in the manner that it is alleged by the Government, necessarily includes a violation of the duty to obey the regulation on handling classified information. Moreover, the conduct underlying the clause 1 and 2 Article 134 offense necessarily included a breach of a custom of the service now set forth in a punitive regulation – AR 380-5. *See* MCM, Part IV, para. 60.c(2)(B) (“Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive.”); *see also* Appellate Exhibit LXXX at 4. As the violation of the regulation is necessarily included in the conduct underlying the clause 1 and 2 Article 134 offense, the duty to obey the regulation is also included in that conduct. Therefore, the first and second elements of the Article 92(1) offense are necessarily included in the second element of the clause 1 and 2 Article 134 offense.

27. Additionally, the third element of the Article 92(1) offense (violation of AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons) is necessarily included in the first element of the clause 1 and 2 Article 134 offense (wrongfully and wantonly causing to be published on the internet information belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy). It is true, as this Court has recognized, that the mens rea required by these two elements is different: “AR 380-5 punishes knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. It does not punish the ‘wanton’ conduct charged in Specification 1 of Charge II[.]” *See* Appellate Exhibit LXXX at 5. But this fact does not change the LIO analysis, as the two offenses need not employ mirror-image statutory language. *See Arriaga*, 70 M.J. at 54; *Bonner*, 70 M.J. at 2; *Alston*, 69 M.J. at 216.

28. The MCM does not define the term “wanton” in the context of disclosure of information, but it does define the term in two other contexts. *See* MCM, Part IV, para. 35.c(8) (defining “wanton” for purposes of Article 111); *id.*, Part IV, para. 100a.c(4) (defining “wanton” for purposes of Article 134, offense of “reckless endangerment”). Both definitions provided by the MCM are essentially the same: “‘Wanton’ includes ‘Reckless’ but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.” *Id.*, Part IV, para. 100a.c(4); *see id.*, Part IV, para. 35.c(8) (“‘Wanton’ includes ‘reckless’, but in describing the operation or physical control of a vehicle, vessel, or aircraft ‘wanton’ may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.”).

29. Thus, “wanton” as used in the first element of the clause 1 and 2 Article 134 offense could potentially include “knowingly,” “willfully,” or “negligently,” as “wanton” can cover recklessness, willfulness, or a disregard of probable consequences. Moreover, even if not every mens rea specified in AR 380-5 is included in “wanton,” that fact does not mean that the Article



92(1) offense is not a LIO of the clause 1 and 2 Article 134 offense. “The fact that there may be an ‘alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.’” *Arriaga*, 70 M.J. at 55 (quoting *McCullough*, 348 F.3d at 626). At the very least, “wanton” can include “willful.” See MCM, Part IV, para. 35.c(8); *id.*, Part IV, para. 100a.c(4). In this case, the Government has clearly indicated that the means by which PFC Manning wrongfully and wantonly caused intelligence to be published on the internet was his alleged willful disclosure of the information to WikiLeaks. See *Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis). In other words, the publication that PFC Manning wrongfully and wantonly caused necessarily included the willful disclosure and, therefore, necessarily included the violation of AR 380-5.

30. Additionally, the fact that the Article 134 offense “adds an additional element not included in the AR 380-5 offense, that the accused knew that the intelligence published on the internet is accessible to the enemy,” Appellate Exhibit LXXX at 5, does not alter the conclusion that the third element of the Article 92(1) offense is necessarily included in the first element of the clause 1 and 2 Article 134 offense. A greater offense can have an additional element not included in the LIO; indeed, a greater offense “is called the greater offense because it contains all of the elements of [the LIO] along with one or more additional elements.” *Jones*, 68 M.J. at 470.

31. This conclusion is also in no way cast into doubt by this Court’s observation that the Article 134 offense “punishes the distribution of ‘intelligence’ which includes information that does not fall within AR 380-5.” See Appellate Exhibit LXXX at 5. The fact that the term “intelligence” as used in the clause 1 and 2 Article 134 offense is a broad enough term to include information that is not confidential or sensitive is irrelevant to the LIO inquiry in this case.

32. It is clear from the way in which the Government has alleged the specifications, especially the date ranges provided in the clause 1 and 2 Article 134 offense, see *Arriaga*, 70 M.J. at 54-55 (resort to the specification in the particular case is proper in an elements test analysis), that the “intelligence” referenced in the clause 1 and 2 Article 134 offense includes the classified or sensitive materials identified in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II. See Charge Sheet. Thus, for these reasons, the third element of the Article 92(1) offense is necessarily included in the first element of the clause 1 and 2 Article 134 offense.

33. Because each of the elements of the Article 92(1) offense is necessarily included in one or more of the elements of the clause 1 and 2 Article 134 offense, the Article 92(1) offense is a subset of the charged Article 134 offense. It is impossible for a member of the Army to violate Article 134 in the manner alleged by the Government, see *Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. See *Schmuck*, 489 U.S. at 719; *Arriaga*, 70 M.J. at 55; see also *Baba*, 21 M.J. at 78 (Cox, J., concurring in the result).

34. Therefore, a violation of AR 380-5 charged under Article 92(1) is a LIO of the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II. Accordingly, this Court should instruct the members of the Article 92(1) LIO for this specification. See *Arriaga*, 70 M.J. at 55; *Girouard*, 70 M.J. at 11; *Jones*, 68 M.J. at 468.



CONCLUSION

35. For the reasons articulated above, the Defense requests that this Court instruct the members on the elements of the Article 92(1) LIO of each offense alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Coombs', with a stylized flourish extending to the right.

DAVID EDWARD COOMBS  
Civilian Defense Counsel

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211 )

Prosecution Response

to Defense Motion for  
Instructions on Lesser  
Included Offense (LIO)

24 May 2012

### RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court deny the Defense Motion for Instructions on Lesser Included Offense. The proposed lesser-included offense (LIO), an Article 92(1) offense in violation of AR 380-5 (hereinafter an "Article 92(1) offense"), is not an LIO of Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II (hereinafter the "18 U.S.C. § 793(e) offenses"), or of Specification 1 of Charge II for two reasons: first, the alleged LIO requires elements not required for the alleged greater offenses; and second, it is possible to prove the alleged greater offenses without first proving the alleged LIO.

### BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense bears the burden of persuasion on any factual issue, the resolution of which is necessary to decide the motion. Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c)(2) (2008). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

### FACTS

The prosecution stipulates to those facts set forth in paragraphs 3-5 of the defense's motion. See Def. Mot. at 3-4.

Army Regulation (AR) 380-5 defines classified information as "information and material that has been determined, pursuant to EO 12958 or any predecessor order, to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary and readable form." AR 380-5, para. 1-1; see also AE LXXX at 2.

AR 380-5 defines sensitive, but unclassified, information as "information originated from within the Department of State which warrants a degree of protection and administrative control and meets the criteria for exemption from mandatory public disclosure under the Freedom of Information Act." AR 380-5, para. 5-7; see also AE LXXX at 2.

AR 380-5 defines "sensitive information" as "[a]ny information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs, or the privacy to which individuals are entitled under section 552a of Title 5, USC (the Privacy Act), but which has not been specifically authorized under

criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.” AR 380-5, para. 5-19(a).

Intelligence is defined as information that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. Intelligence imports that the information conveyed is true or implies the truth, at least in part. See AE LXXX at 2; see also Manual for Courts-Martial, United States pt. IV, ¶ 28.c.(5)(a); see also U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook (1 January 2010) (3-28-4) (Benchbook).

The Benchbook lists the following elements for a charged offense under Article 92(1), UCMJ:

(1) That there was in existence a certain lawful general (order) (regulation) in the following terms: (state the date and specific source of the alleged general order or regulation and quote the order or regulation or the specific portion thereof);

(2) That the accused had a duty to obey such (order) (regulation);  
and

(3) That (state the time and place alleged), the accused (violated) (failed to obey) this lawful general (order) (regulation) by (here the military judge should enumerate the specific acts and any state of mind or intent alleged which must be established by the prosecution in order to constitute the violation of the order or regulation).

### WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the Appellate Exhibits referenced herein.

### ELEMENTS

The prosecution requests this Court adopt the following elements for the specifications charging misconduct in violation of 18 U.S.C. § 793(e), specifically Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II, and for Specification 1 of Charge II:

#### 18 U.S.C. § 793(e)

(1) That the accused, at or near Contingency Operating Station Hammer, Iraq and between on or about (state date range) had possession of information relating to the national defense, to wit: (the named information);

(2) That the possession was unauthorized;

(3) That the accused had reason to believe that such information could be used to [the injury of the United States] [the advantage of any foreign nation];

(4) That the accused willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it;

(5) That, at the time, 18 U.S.C. § 793(e) was in existence; and

(6) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

See Charge Sheet; see also AE LVIII at 2.

#### Specification 1 of Charge II

(1) That the accused did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, cause to be published on the internet intelligence belonging to the United States government;

(2) That the accused did so wrongfully and wantonly;

(3) That the accused had knowledge that intelligence published on the internet is accessible to the enemy; and

(4) That, under the circumstances, the conduct of the accused was to the prejudicial to good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

See Charge Sheet; see also AE LX at 4.

### LEGAL AUTHORITY AND ARGUMENT

The prosecution respectfully requests this Court deny the Defense Motion for Instructions on Lesser Included Offense. An Article 92(1) offense, in violation of AR 380-5, is not an LIO of the 18 U.S.C. § 793(e) offenses or of Specification 1 of Charge II for two reasons: first, the alleged LIO (i.e., an Article 92(1) offense) requires elements not required for the alleged greater offenses; and second, it is possible to prove the alleged greater offenses without first proving the alleged LIO.

Article 79, UCMJ, states that “[a]n accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.” Article 79, UCMJ. Military courts adopt the “elements test to determine whether one offense is an LIO of another.” United States v. Arriaga, 70 M.J. 51, 54 (C.A.A.F. 2011). This test requires the Court first to determine the elements of the

charged offense and the alleged LIO by applying the principles of statutory construction, and second to “compare the elements of the two offenses to see if the latter is a subset of the former.” United States v. Bonner, 70 M.J. 1, 2 (C.A.A.F. 2011); see also Arriaga, 70 M.J. at 54 (finding that the court may consider the statutory elements or the elements as charged); see also United States v. Alston, 69 M.J. 214, 216 (C.A.A.F. 2010) (stating that the offenses need not “employ identical statutory language,” but “[i]nstead the meaning of the offenses is ascertained by applying the ‘normal principles of statutory construction’”).

Under the elements test, “if all of the elements of [the lesser offense] are also elements of [the greater offense], then [the lesser offense] is an [LIO] of [the greater offense].” United States v. Jones, 68 M.J. 465, 470 (C.A.A.F. 2010). Put another way, if it is impossible to prove the greater offense without also proving the lesser offense, an LIO instruction is proper. See Arriaga, 70 M.J. at 55; see also Schmuck v. United States, 489 U.S. 705, 719 (1989) (“[T]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser”). However, “[w]here the lesser offense requires an element not required for the greater offense, no instruction is to be given under [Article 79, UCMJ].” Jones, 68 M.J. at 470 ((citing Schmuck, 489 U.S. at 719 (discussing Fed. R. Crim. P. 31(c) “whose language at that time,” CAAF concluded, “was almost identical to Article 79, UCMJ”)).

In Arriaga, the appellant was charged with burglary and the military judge, *sua sponte*, provided an LIO instruction for housebreaking. The intent element of burglary, as charged, required the intent to commit an offense under Article 120, UCMJ, which also satisfied the intent element of housebreaking. On appeal, the CAAF affirmed with the following reasoning:

While in another case it may be possible to prove a housebreaking offense by proving the intent to commit a criminal offense not designated in the third element of burglary, that is not the offense charged in this case. The offense as charged included all of the elements of housebreaking and all of those elements are also elements of burglary. Housebreaking is therefore a lesser included offense of burglary.

Id., at 55. Here, the alleged LIO (i.e., an Article 92(1) offense) contains elements not required for the 18 U.S.C. § 793(e) offenses or for Specification 1 of Charge II, either by statute or as written – specifically the existence of AR 380-5 and the accused’s duty to obey it. Further, it is possible to prove the 18 U.S.C. § 793(e) offenses and Specification 1 of Charge II, either by statute or as written, without also proving an Article 92(1) offense. Thus, an Article 92(1) offense is not an LIO of the 18 U.S.C. § 793(e) offenses or of Specification 1 of Charge II.

**I: AN ARTICLE 92(1) OFFENSE, IN VIOLATION OF ARMY REGULATION 380-5, IS NOT A LESSER-INCLUDED OFFENSE OF THE 18 U.S.C. § 793(e) OFFENSES.**

The elements test requires the Court first to determine the elements of the 18 U.S.C. § 793(e) offenses and the alleged LIO by applying the principles of statutory construction, and

second to “compare the elements of the two offenses to see if the latter is a subset of the former.” Bonner, 70 M.J. at 2. The prosecution requests this Court adopt the above elements for the specifications charging misconduct in violation of 18 U.S.C. § 793(e).

The proposed elements of an alleged Article 92(1) offense are as follows:

- (1) That there was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;
- (2) That the accused had a duty to obey such regulation; and
- (3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

The elements of an Article 92(1) offense are not a subset of the elements of the 18 U.S.C. § 793(e) offenses, either by statute or as written. An Article 92(1) offense requires elements not required for the 18 U.S.C. § 793(e) offenses, either by statute or as written. See Jones, 68 M.J. at 470 (“Where the lesser offense requires an element not required for the greater offense, no [LIO] instruction is to be given”). The first and second elements of an Article 92(1) offense (i.e., that AR 380-5 was in existence and that the accused had a duty to obey it) are not elements of the 18 U.S.C. § 793(e) offenses, either by statute or as written. Further, it is possible to prove the 18 U.S.C. § 793(e) offenses, either by statute or as written, without also proving an Article 92(1) offense. See Arriaga, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove the greater offense without also proving the lesser offense).

The defense argues that the first and second elements of an Article 92(1) offense are necessarily included in elements of the 18 U.S.C. § 793(e) offenses, specifically that the accused’s had unauthorized possession of information, and that the conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces (hereinafter, “clauses 1 and 2”). See Def. Mot. at 19, 21. The defense argues the third element of an Article 92(1) offense is necessarily included in the fourth element of the 18 U.S.C. § 793(e) offenses. See Def. Mot. at 20. The prosecution responds to each defense argument in turn.

The first and second elements of an Article 92(1) offense (i.e., that AR 380-5 was in existence and that the accused had a duty to obey it) are not necessarily included in the element of unauthorized possession, either by statute or as written. The defense reasons that “any ‘unauthorized possession of information’ relating to the national defense must necessarily implicate the duties imposed by AR 380-5.” Def. Mot. at 19. The Soldier may have an obligation to safeguard that information under AR 380-5; however, proof that AR 380-5 was in effect and that the Soldier had a duty to obey it is not necessary to satisfy the element of unauthorized possession, either by statute or as written. The Government may prove unauthorized possession by means other than AR 380-5. See Arriaga, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense). Thus, the first and second elements of an Article 92(1) offense are not

necessarily included in the element of unauthorized possession under the 18 U.S.C. § 793(e) offenses, either by statute or as written.

The first and second elements of an Article 92(1) offense are not necessarily included in clauses 1 and 2 of the 18 U.S.C. § 793(e) offenses, as written.<sup>1</sup> The defense argues the charged misconduct necessarily includes a violation of AR 380-5 to satisfy clauses 1 and 2. See Def. Mot. at 21. Again, while the Manual for Courts-Martial contemplates that “[a] breach of a custom of the service may result in a violation of clause 1 of Article 134,” the prosecution is not limited to AR 380-5 in proving the elements of clauses 1 and 2. See MCM, Part VI, ¶ 60.c(2). The prosecution is at liberty to present other circumstances that satisfy these elements. It is possible to prove clauses 1 and 2 without the use of AR 380-5. See Arriaga, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense). Thus, the first and second elements of an Article 92(1) offense are not necessarily included in any element of the 18 U.S.C. § 793(e) offenses, either by statute or as written.

The third element of an Article 92(1) offense is not necessarily included in the fourth element of Specifications 2 and 11 of Charge II, either by statute or as written. The elements of Specifications 2 and 11 of Charge II, as written, do not require the prosecution to prove the information was classified or sensitive, as defined under AR 380-5. See Jones, 68 M.J. at 470 (“Where the lesser offense requires an element not required for the greater offense, no [LIO] instruction is to be given”). AR 380-5 governs the safeguarding of classified or sensitive information, not national defense information. National defense information for an 18 U.S.C. § 793 offense is information that is (1) “closely held by the government...[and] (2) potentially damaging to the United States or useful to an enemy of the United States if disclosed without authorization.” United States v. Rosen, 599 F.Supp.2d 690, 695 (E.D. Va. 2009) (ruling that “evidence that information is classified does not, by itself, establish that the information is national defense information; evidence that information is classified is, at most, evidence that the government intended that the designated information be closely held”). Thus, the third element of an Article 92(1) offense is not necessarily included in the fourth element of Specifications 2 and 11 of Charge II, either by statute or as written.

Accordingly, an Article 92(1) offense, in violation of AR 380-5, is not an LIO of the 18 U.S.C. § 793(e) offenses.

**II: AN ARTICLE 92(1) OFFENSE, IN VIOLATION OF ARMY REGULATION 380-5, IS NOT A LESSER INCLUDED OFFENSE OF SPECIFICATION 1 OF CHARGE II.**

The elements test requires the Court first to determine the elements of Specification 1 of Charge II and the alleged LIO by applying the principles of statutory construction, and second to “compare the elements of the two offenses to see if the latter is a subset of the former.” Bonner, 70 M.J. at 2. The prosecution requests this Court adopt the above elements for Specification 1 of Charge II. The proposed elements of an alleged Article 92(1) offense in violation of AR 380-5 are listed above. See supra Section I.

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<sup>1</sup> Clauses 1 and 2 are not statutory elements of 18 U.S.C. § 793(e).

The elements of an Article 92(1) offense are not a subset of the elements of Specification 1 of Charge II, either by statute or as written. An Article 92(1) offense requires elements not required for an Article 134 offense or under Specification 1 of Charge II, as written. See Jones, 68 M.J. at 470 ("Where the lesser offense requires an element not required for the greater offense, no [LIO] instruction is to be given"). The first and second elements of an Article 92(1) offense (i.e., that AR 380-5 was in existence and that the accused had a duty to obey it) are not elements of an Article 134 offense or under Specification 1 of Charge II, as written. Further, it is possible to prove an Article 134 offense and Specification 1 of Charge II without also proving an Article 92(1) offense. See Arriaga, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense).

The defense argues the first and second elements of an Article 92(1) offense in violation of AR 380-5 (i.e., the existence of AR 380-5 and the accused's duty to obey it) are necessarily included in clauses 1 and 2 of an Article 134 offense or under Specification 1 of Charge II, as written. The defense argues that the third element of an Article 92(1) offense (i.e., that the accused violated AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons) is necessarily included in the first, second, and third elements of Specification 1 of Charge II, as written (i.e., that the accused wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, knowing that intelligence published on the internet is accessible to the enemy). The prosecution responds to each defense argument in turn.

The first and second elements of an Article 92(1) offense (i.e., the existence of AR 380-5 and the accused's duty to obey it) are not necessarily included in clauses 1 and 2 of an Article 134 offense or under Specification 1 of Charge II, as written. As explained above, it is possible to prove clauses 1 and 2 without the use of AR 380-5. See supra Section I; see also Arriaga, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense). The first and second elements of an Article 92(1) offense are not necessarily included in any element of an Article 134 offense or under Specification 1 of Charge II, as written.

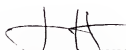
The third element of an Article 92(1) offense (i.e., that the accused violated AR 380-5 by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons) is not necessarily included in the first, second, and third elements of Specification 1 of Charge II, as written (i.e., that the accused wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, knowing that intelligence published on the internet is accessible to the enemy). The prosecution recognizes that "intelligence encompasses more than classified and sensitive information." AE LXXX at 2. However, Specification 1 of Charge II, as written, does not require the prosecution to prove the intelligence was classified or sensitive under AR 380-5 – an element required for an Article 92(1) offense in violation of AR 380-5. See Jones, 68 M.J. at 470 ("Where the lesser offense requires an element not required for the greater offense, no [LIO] instruction is to be given"). Proving information may be useful to the enemy for any of the many reasons that make information valuable to belligerents and that it is true or implies the truth, at least in part, may be accomplished without the use of AR 380-5. See Arriaga, 70 M.J. at 55 (stating that there should



not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense). Thus, the third element of an Article 92(1) offense is not necessarily included in the first, second, and third elements of Specification 1 of Charge II, as written.

### CONCLUSION

The prosecution respectfully requests this Court deny the Defense Motion for Instructions on Lesser Included Offense. An Article 92(1) offense, in violation of AR 380-5, is not an LIO of the 18 U.S.C. § 793(e) offenses or of Specification 1 of Charge II for two reasons: first, the alleged LIO (i.e., an Article 92(1) offense) requires elements not required for the alleged greater offenses; and second, it is possible to prove the alleged greater offenses without first proving the alleged LIO.



J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 24 May 2012.



J. HUNTER WHYTE  
CPT, JA  
Assistant Trial Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, xxx-xx-[REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

)  
)  
) **DEFENSE REPLY TO**  
) **GOVERNMENT RESPONSE TO**  
) **DEFENSE MOTION FOR**  
) **INSTRUCTIONS ON LESSER**  
) **INCLUDED OFFENSE (LIO)**

) DATED: 29 May 2012  
)

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, pursuant to applicable case law, Article 79, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 879 (2010), and Rule for Courts Martial (R.C.M.) 920(e)(2), requests this Court to instruct the members on the elements of Article 92(1) for a violation of Army Regulation 380-5 (AR 380-5) as a lesser included offense (LIO) of each of the offenses alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

ARGUMENT

2. The arguments raised in the Government's Response to Defense Motion for Instructions on Lesser Included Offense (LIO) [hereinafter Government's Response] can be easily cabined into one or more of the following categories: nonresponsive to the Defense arguments, without merit, incomplete, or inconsistent with established case law. Upon close inspection, none of the Government's arguments as to why Article 92(1) is not a LIO of the 18 U.S.C. Section 793(e) offenses or why Article 92(1) is not a LIO of the clause 1 and 2 Article 134 offense are correct. Accordingly, this Court should, for the reasons stated herein and in the Defense Motion for Instructions on Lesser Included Offense (LIO) [hereinafter Defense Motion], grant the relief requested by the Defense.

**A. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Each Specification Charging PFC Manning with a Violation of 18 U.S.C. Section 793(e) and Article 134**

3. In its Response, the Government disputes that any of the elements of an Article 92(1) offense, charged as a violation of AR 380-5, are necessarily included in a violation of Section 793(e) charged under clause 3 of Article 134.<sup>1</sup> The Government's contentions are incomplete,

<sup>1</sup> This Reply uses the elements set out in the Defense Motion. For ease of reference, those elements are reproduced in this footnote. For the Section 793(e) violations charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II, those elements are:

foreclosed by clear precedent from the Court of Appeals for the Armed Forces, or both. All of its arguments are without merit. Each is discussed in turn.

4. The Government first contends that the first and second elements of the Article 92(1) offense (i.e. the existence of the lawful general regulation and the accused's duty to obey it) are not necessarily included in the first element of the Section 793(e) offense (i.e. unauthorized possession of the information) because "[t]he Government may prove unauthorized possession by means other than AR 380-5." Government Response, at 5. For support the Government offers the following citation and parenthetical: "See *Arriaga*, 70 M.J. at 55 (stating that there should not be an LIO instruction where it is possible to prove greater offense without also proving lesser offense)." *Id.* at 5.

5. While it may be true that the unauthorized possession element of Section 793(e) may, in some cases, be proved by means other than AR 380-5, the Government's response does not specify how, as the offenses are charged in this case, this can be done. Any proper "elements test" analysis must consider the elements of the offenses not only in the statutory abstract, but also as those elements are charged in the specification. See *United States v. Arriaga*, 70 M.J. 51, 54 (C.A.A.F. 2011) ("[C]omparison of the statutory elements *as charged in the specification* is allowed." (emphasis supplied); *id.* at 55 ("Regardless of whether one looks strictly to the statutory elements *or to the elements as charged*, housebreaking is a [LIO] of burglary . . . [T]he offense *as charged in this case* clearly alleges the elements of both offenses." (emphases supplied)); see also *United States v. Nealy*, 71 M.J. 73, 79 & n.1 (C.A.A.F. 2012) (Baker, C.J., concurring in the result) (explaining that, under *Arriaga*, the specification itself may provide

- 
- (1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about [varying date ranges], had unauthorized possession of information;
  - (2) The information was relating to the national defense, to wit: [the named information];
  - (3) The accused knew or had reason to believe that the information could be used to the injury of the United States or to the advantage of any foreign nation;
  - (4) The accused willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted the information to a person not entitled to receive it; and
  - (5) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Defense Motion, at 4-5. The elements of an Article 92(1) offense for a violation of AR 380-5 are:

- (1) There was in effect a certain lawful general order or regulation in the following terms: Paragraphs 1-21 and 6-1, Army Regulation 380-5, dated 29 September 2000;
- (2) The accused had a duty to obey this regulation; and
- (3) That on divers occasions between on or about [varying date ranges], at or near Contingency Operating Station Hammer, Iraq, the accused violated this lawful general regulation by knowingly, willfully, or negligently disclosing classified or sensitive information to unauthorized persons.

*Id.* at 5.

notice to an accused of the LIOs of the charged offense(s)); *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010) (examining the elements as charged in the specification when conducting an elements test analysis). Indeed, *Alston* makes clear that the mere fact that the greater offense could, in some other case, be proved without necessarily including the lesser offense does not preclude the lesser offense from being a LIO where the greater offense, as charged in the particular specification at issue, demonstrates that the lesser offense is in fact included in the greater offense.

6. In *Alston*, the accused was charged with rape by force under Article 120(a)(1). 69 M.J. at 215. Article 120(t)(5) provides three different methods by which the force element of rape by force can be established:

The term “force” means action to compel submission of another or to overcome or prevent another’s resistance by --

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

10 U.S.C. § 920(t)(5). However, the facts alleged in the charge in *Alston* indicated that only one of those methods – Article 120(t)(5)(C) – was implicated in that particular case:

[T]he charge at issue alleged that [the accused] caused Private E-2 (PV2) T, a fellow soldier, to “engage in a sexual act, to wit: penetration of her vagina with his fingers by using power or strength or restraint applied to her person sufficient that she could not avoid or escape the sexual conduct.”

69 M.J. at 215. The military judge instructed the members on the elements of rape by force and on the elements of the purported LIO of aggravated sexual assault under Article 120(c)(1)(B), which required causing bodily harm. *Id.*

7. The Court of Appeals for the Armed Forces found that aggravated sexual assault under Article 120(c)(1)(B) was a LIO of rape by force under Article 120(a)(1) based on the facts alleged in the charge. *Id.* at 216. In comparing the elements of the two offenses, the *Alston* Court helpfully explained:

The second element of aggravated sexual assault – “causing bodily harm” under Article 120(c)(1)(B) – means “any offensive touching of another, however slight.” Article 120(t)(8). The parallel element in the offense of rape *as charged in the present case* – using “force” under Article 120(a)(1) – means “action to compel submission of another or to overcome or prevent another’s resistance by . . . physical violence, strength, power, or restraint applied to another person,

sufficient that the other person could not avoid or escape the sexual conduct.”  
Article 120(t)(5)(C).

*Id.* (emphasis supplied). The Court’s conclusion that aggravated sexual assault was, based on the charged conduct, a LIO of rape by force was unaffected by the fact that the force element of rape could have been proven, in some other case, through the different methods provided in Article 120(t)(5)(A)-(B):

The bodily harm element of aggravated sexual assault under Article 120(c) – defined in Article 120(t)(8) to include an offensive touching, however slight – is a subset of the force element in the offense of rape under Article 120(a), as defined in Article 120(t)(5)(C). *We note that the definitions of force in Article 120(t)(5)(A) and Article 120(t)(5)(B), which do not require an offensive touching, are not at issue in the present case.*

*Id.* (emphasis supplied).

8. Thus, *Alston* clearly demonstrates why the Government’s conclusory and vague assertion that “[t]he Government may prove unauthorized possession by means other than AR 380-5[.]” Government Response, at 5, even if true in some abstract sense, is nonresponsive to the appropriate inquiry of whether the first two elements of the Article 92(1) offense are included in the first element of the Section 793(e) offense *as that offense is charged in the specification*. If the Government’s theory (i.e. if there is a way to prove a particular element of the greater offense without including the relevant element of the purported LIO, then the purported LIO is not an LIO) were correct, *Alston* would have been decided differently: The fact that the force element of rape by force could be proved three different ways, *see* Article 120(t)(5)(A)-(C), and that only one of those ways included an offensive touching, would have precluded the finding of the Court of Appeals for the Armed Forces that sexual aggravated assault was, based on the charged conduct, a LIO of rape by force. *see Alston*, 69 M.J. at 216.

9. Far from providing support for the Government’s theory, *Alston* unmistakably rejects it. The fact that the greater offense in the general, abstract sense (i.e. divorced from the language of the specification) allows the Government to prove the greater offense without also proving the lesser offense does not preclude the lesser offense from being a LIO of the greater offense where, as here, the greater offense, as charged in the specification, will require the Government to establish the elements of the lesser offense. In such a case, the lesser offense is properly determined to be a LIO of the greater offense. *See Alston*, 69 M.J. at 216; *see also Nealy*, 71 M.J. at 79 & n.1 (Baker, C.J., concurring in the result); *Arriaga*, 70 M.J. at 54-55.

10. *Arriaga*, notwithstanding the Government’s citation to it, does not change this analysis. The *Arriaga* Court explained that:

Regardless of whether one looks strictly to the statutory elements or to the elements as charged, housebreaking is a lesser included offense of burglary. Comparing the statutory elements, it is impossible to prove a burglary without

also proving a housebreaking. Furthermore, the offense as charged in this case clearly alleges the elements of both offenses.

70 M.J. at 55. The Government represents that *Arriaga* “stat[es] that there should not be an LIO instruction where it is possible to prove [the] greater offense without also proving [the] lesser offense.” Government Response, at 5. First of all, nowhere in the above quoted passage or the rest of the *Arriaga* opinion does the Court make any statement to this effect. See *Arriaga*, 70 M.J. at 54-55. Additionally, as demonstrated above, the Government has confused possibility in the general or abstract sense (which is not determinative in the LIO inquiry) with possibility under the facts alleged in the specification. *Arriaga* provides no support for the Government’s erroneous position that because of the mere fact that the greater offense can, in some other prosecution or in some general sense, be proved without proving the elements of the lesser offense, the lesser offense is not a LIO. *Alston* is directly contrary to this position, and *Arriaga* did not modify *Alston* in this regard.

11. Returning to the proper inquiry, the Government has in no way indicated how it can prove the element of unauthorized possession of the information charged in Specifications 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II without also establishing the existence of the accused’s duty to obey the regulation on handling classified and sensitive information. That is not surprising, for the Government would be hard pressed to accomplish such a feat. As was stated in the Defense Motion, any “unauthorized possession of information” relating to the national defense must necessarily implicate the duties imposed by AR 380-5. Accordingly, the duty to obey the regulation on handling classified and sensitive information imposed by AR 380-5 (the first two elements of the Article 92(1) offense) is a subset of the unauthorized possession of each charged Section 793(e) violation (the first element of the Section 793(e) offense). Therefore, the first two elements of the Article 92(1) offense are necessarily included in the first element of the Section 793(e) offense.

12. The Government next contends that the first two elements of the Article 92(1) offense are not necessarily included in the fifth element of the Section 793(e) offense (i.e. the clause 1 and 2 of Article 134 element) because “[i]t is possible to prove clauses 1 and 2 without the use of AR 380-5.” Government Response, at 6.

13. Much like the Government argument discussed above, this cryptic and vague sentence provides no indication of how the Government can prove clauses 1 and 2 of Article 134, based on the specifications in this case, without establishing the existence of an accused’s duty to obey AR 380-5. For one thing, to the extent the Government is asserting that the first two elements of the Article 92(1) offense are not necessarily included in the fifth element of the Section 793(e) offense because it is possible, in some general and abstract sense, to prove clauses 1 and 2 without the use of AR 380-5, that argument is meritless in light of *Alston*. See *Alston*, 69 M.J. at 216 (rejecting the notion that the fact that there is some way to prove the greater offense without proving the lesser offense, the lesser offense cannot be a LIO of the greater offense, regardless of the language of the specification in any particular case); see also *supra*. The Government’s inaccurate citation to *Arriaga* does not support its position. See *supra*.

14. For another thing, the Government has offered no indication of how it could prove that the conduct alleged in *this specification* constitutes a violation of clause 1 and 2 without necessarily establishing a violation of AR 380-5. As was stated in the Defense Motion, the conduct that the Government alleges was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces – a Section 793(e) violation – for the fifth element of the Section 793(e) offense necessarily included a breach of a custom of the service now set forth in a punitive regulation – AR 380-5. As the violation of the regulation is necessarily included in the conduct underlying the Section 793(e) violation, the duty to obey the regulation is also included in that conduct. Accordingly, the first two elements of the Article 92(1) offense are also necessarily included in the fifth element of the Section 793(e) offense, as the Government has charged that offense in this case. The Government has offered no real response to this Defense argument.

15. Finally, the Government argues that the third element of the Article 92(1) offense (i.e. the accused knowingly, willfully, or negligently disclosed classified or sensitive information to unauthorized persons) is not necessarily included in the fourth element of the Section 793(e) offense (i.e. the accused willfully communicated, delivered, or transmitted, or caused to be communicated, delivered, or transmitted the information to a person not entitled to receive it), at least with respect to Specifications 2 and 11 of Charge II. See Government Motion, at 6. The Government reasons that this is because “Specifications 2 and 11 of Charge II, as written, do not require the prosecution to prove the information was classified or sensitive, as defined under AR 380-5.” *Id.*

16. At the outset, with respect to this element of the Article 92(1) offense, the Government only challenges whether “sensitive or classified information” is necessarily included in the “national defense information” specified in Specifications 2 and 11 of Charge II. The Government does not dispute that the third element of the Article 92(1) offense is necessarily included in Specifications 3, 5, 7, 9, 10 and 15 of Charge II, as these specifications expressly allege that the information is “classified.” See Charge Sheet.

17. Specifications 2 and 11 of Charge II require the Government to prove that the information is “relating to the national defense.” *Id.* If the Government is able to prove that the information is relating to the national defense, it will necessarily establish that the information is “sensitive” under AR 380-5. Thus, the Government’s only objection to the Defense position that the third element of the Article 92(1) offense is necessarily included in the fourth element of the Section 793(e) offense – namely, that proving that the information is national defense information will not establish that the information is classified or sensitive under AR 380-5 – is without merit.

18. In its Response, the Government proposes the following definition of national defense information: “National defense information for an 18 U.S.C. § 793 offense is information that is (1) ‘closely held by the government . . . [and (2)] potentially damaging to the United States or useful to an enemy of the United States if disclosed without authorization.’” Government Response, at 6 (quoting *United States v. Rosen*, 599 F. Supp. 2d 690, 695 (E.D. Va. 2009)). Therefore, by its own admission, the Government will need to prove that the information in Specifications 2 and 11 of Charge II is “potentially damaging to the United States or useful to an

enemy of the United States if disclosed without authorization.” *Id.* AR 380-5 defines “sensitive information” as:

Any information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs, or the privacy to which individuals are entitled under section 552a of Title 5, USC (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

AR 380-5, para. 5-19a; *see* Government Response, at 1-2 (containing this definition). Thus, if the Government is able to prove that the information in Specifications 2 and 11 of Charge II is national defense information (i.e. that it is “potentially damaging to the United States or useful to an enemy of the United States if disclosed without authorization”) it will, of necessity, establish that the information is also sensitive information under AR 380-5 (i.e. that it is “information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs”). The fact that the definition of sensitive information is broad enough to include information that is not national defense information is irrelevant to the LIO inquiry. *See Arriaga*, 70 M.J. at 55 (“The fact that there may be an ‘alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.’” (quoting *United States v. McCullough*, 348 F.3d 620, 626 (7th Cir. 2003))). As the Government has defined “national defense information” and as AR 380-5 defines “sensitive information,” if information is national defense information it is, by necessity, sensitive information. Thus, for this reason and the reasons articulated in the Defense Motion, the third element of the Article 92(1) offense is necessarily included in the fourth element of the Section 793(e) offense.

19. At the end of the day, the elements test is the approach used to determine whether one offense is a “subset” of another. *See Schmuck v. United States*, 489 U.S. 705, 716 (1989); *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011). Because every element of the Article 92(1) offense is necessarily included in one or more elements of the Section 793(e) offense, as charged under clause 3 of Article 134, the Article 92(1) offense is a subset of the Section 793(e) offense. Every violation of Section 793(e) perpetrated by a member of the Army must, of necessity, include a violation of AR 380-5. It is impossible for a member of the Army to violate Section 793(e) in the manner alleged by the Government, *see Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. *See Schmuck*, 489 U.S. at 719 (explaining that when it is impossible to commit the greater offense without also committing the lesser offense, the lesser offense is a LIO); *Arriaga*, 70 M.J. at 55 (similar); *see also United States v. Baba*, 21 M.J. 76, 78 (C.M.A. 1985) (Cox, J., concurring in the result) (“The elements of an offense under Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 . . . are necessarily included in the elements of an offense under Article 134, UCMJ, 10 U.S.C. § 934, and 18 U.S.C. § 793(d).”).

20. Therefore, for these reasons and for the reasons stated in the Defense Motion, an Article 92(1) offense stating a violation of AR 380-5 is a LIO for each Section 793(e) offense alleged by the Government.



**B. A Violation of Army Regulation 380-5, Chargeable Under Article 92(1), is a Lesser Included Offense of Specification 1 of Charge II**

21. In its Response, the Government disputes that any of the elements of an Article 92(1) offense, charged as a violation of AR 380-5, are necessarily included in the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II.<sup>2</sup> Much like its arguments with respect to the Article 92(1) LIO for the Section 793(e) offenses, *see* Part A, *supra*, the Government's arguments with respect to the Article 92(1) LIO for the clause 1 and 2 Article 134 offense are incomplete, inconsistent with clear case law, or both. Each argument is discussed in turn.

22. The Government first argues that the first two elements of the Article 92(1) offense (i.e. the existence of the lawful general regulation and the accused's duty to obey it) are not necessarily included in the second element of the clause 1 and 2 Article 134 offense (i.e. that the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces) because "it is possible to prove clauses 1 and 2 without the use of AR 380-5." Government Response, at 8.

23. This remarkably cryptic and conclusory argument is, for the reasons stated above, entirely meritless. *See* Part A, *supra*. Namely, to the extent the Government is arguing that the first two elements of the Article 92(1) offense are not necessarily included in the second element of the clause 1 and 2 Article 134 offense because it is possible, in some general and abstract sense, to prove clauses 1 and 2 without the use of AR 380-5, that argument is meritless in light of *Alston*. *See Alston*, 69 M.J. at 216. The Government's citation to *Arriaga* does not somehow do away with this indisputable fact. In addition, the Government has offered no indication of how it could prove that the conduct alleged in *this specification* constitutes a violation of clause 1 and 2 without necessarily establishing a violation of AR 380-5. The Government has thus offered no real rebuttal to the Defense argument that the conduct that is allegedly prejudicial to good order and discipline and service discrediting – wrongfully and wantonly causing intelligence to be published on the internet with the knowledge that intelligence published on the internet is accessible to the enemy – necessarily includes the breach of a custom of the service now set forth in a punitive regulation – AR 380-5. Accordingly, the Defense maintains that, the duty to obey that regulation (the first and second elements of the Article 92(1) offense) is necessarily included in the prejudicial and service discrediting conduct (the second element of the clause 1 and 2 Article 134 offense).

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<sup>2</sup> Like above, *see* note 1, *supra*, the elements of Specification 1 of Charge II outlined in the Defense Motion are used in this Reply. Those elements are:

(1) The accused, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly caused to be published on the internet intelligence belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy; and

(2) Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

24. The Government next asserts that the third element of the Article 92(1) offense (i.e. the accused knowingly, willfully, or negligently disclosed classified or sensitive information to unauthorized persons) is not necessarily included in the first element of the clause 1 and 2 Article 134 offense alleged in Specification 1 of Charge II (i.e. wrongfully and wantonly causing to be published on the internet intelligence belonging to the United States, having knowledge that intelligence published on the internet is accessible to the enemy) because "Specification 1 of Charge II, as written, does not require the prosecution to prove the intelligence was classified or sensitive under AR 380-5 – an element required for an Article 92(1) offense in violation of AR 380-5." Government Response, at 8.

25. While the Government is not "required to prove" that the intelligence was classified or sensitive in order to secure a conviction on Specification 1 of Charge II, the elements test does not ask what the Government is "required to prove." Rather, the elements test is used to determine whether one offense is a "subset" of another. See *Schmuck*, 489 U.S. at 716; *Bonner*, 70 M.J. at 2. A comparison of the definitions of "intelligence" and "sensitive information" demonstrates that if the Government is able to prove that the information in Specification 1 of Charge II is "intelligence," it will necessarily establish that the information is "sensitive information" under AR 380-5. Thus, because information that is "intelligence" is necessarily "sensitive information" under AR 380-5, the third element of the Article 92(1) offense is a subset of the first element of the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II.

26. If the information is intelligence, it means that it "may be useful to the enemy for any of the many reasons that make information valuable to belligerents." Appellate Exhibit LXXX, at 2; see Government Response, at 8. If the information is useful to the enemy, it is certainly "information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest," AR 380-5, and is thus sensitive information under AR 380-5. The fact that the definition of sensitive information is broad enough to include information that is not "intelligence" is irrelevant to the LIO inquiry. See *Arriaga*, 70 M.J. at 55 ("The fact that there may be an 'alternative means of satisfying an element in a lesser offense does not preclude it from being a lesser-included offense.'" (quoting *McCullough*, 348 F.3d at 626)). Therefore, for this reason and the reasons stated in the Defense Motion, the third element of the Article 92(1) offense is necessarily included in the first element of the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II.

27. In sum, because each of the elements of the Article 92(1) offense is necessarily included in one or more of the elements of the clause 1 and 2 Article 134 offense, the Article 92(1) offense is a subset of the charged Article 134 offense. It is impossible for a member of the Army to violate Article 134 in the manner alleged by the Government, see *Arriaga*, 70 M.J. at 54-55, without also violating AR 380-5. See *Schmuck*, 489 U.S. at 719; *Arriaga*, 70 M.J. at 55; see also *Baba*, 21 M.J. at 78 (Cox, J., concurring in the result). Therefore, the Article 92(1) offense, charged as a violation of AR 380-5 is a LIO of the clause 1 and 2 Article 134 offense charged in Specification 1 of Charge II.

CONCLUSION

28. For the reasons articulated above and in the original motion submitted by the Defense, the Defense requests that this Court instruct the members on the elements of the Article 92(1) LIO of each offense alleged in Specifications 1, 2, 3, 5, 7, 9, 10, 11 and 15 of Charge II.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David E. Coombs', written in a cursive style.

DAVID EDWARD COOMBS  
Civilian Defense Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )

v. )

MANNING, Bradley E., PFC )

U.S. Army, xxx-xx- )

Headquarters and Headquarters Company, U.S. )

Army Garrison, Joint Base Myer-Henderson Hall, )

Fort Myer, VA 22211 )

**DEFENSE MOTION TO  
REQUIRE NON-EX PARTE  
FILING BY GOVERNMENT**

22 May 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (RCM) 905, Military Rule of Evidence (MRE) 505, Manual for Courts-Martial (MCM), United States, 2008; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court require the Government to file a non-*ex parte* version of its motion for substitutions under MRE 505(g)(2) IAW MRE 505(i)(4)(A).

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense requests that the Court consider the following:

- a) Government Disclosure to the Court dated 18 May 2012; and
- b) Defense e-mail request dated 21 May 2012, Court's request for the filing of a motion dated 22 May 2012, and Defense's acknowledgement dated 22 May 2012. (Attachment).

FACTS

4. On 18 May 2012, the Government filed an *in camera* motion for substitutions under MRE 505(g)(2). On 21 May 2012, the Defense requested by e-mail that the Court order the

Government to file a non-*ex parte* version of its motion. On 22 May 2012, the Court requested the Defense to file a written motion in support of its request.

### ARGUMENT

5. MRE 505(g)(2) permits the military judge to authorize the limited disclosure of classified information following an *in camera* review, unless the military judge determines that the classified information itself is necessary to enable the accused to prepare for trial. *Id.*; see also *United States v. Lonetree*, 31 M.J. 849 (N-M-C.M.R. 1990), aff'd 35 M.J. 396 (C.M.A. 1992). Limited disclosure and substitutes include:

- a) Deletion of specific items of classified information from documents to be made available to an accused;
- b) Substitution of a portion or summary of the information for such documents;
- c) Substitution of a statement admitting relevant facts;

All of these are permitted unless the judge determines that the classified information itself is necessary to enable the accused to prepare for trial. See MRE 505(g)(2).

6. As discussed in *Lonetree*, a request for an *in camera* review for substitutions under MRE 505(g)(2) is controlled by the procedures outlined in MRE 505(i). *Lonetree*, 31 M.J. at 857. As in the instant case, the government in *Lonetree* sought to limit or prevent disclosure of classified information under MRE 505(g)(2). The Court stated:

Germane to this appeal are the subdivisions that authorize a military judge to limit or prevent disclosure to an accused of classified information. Mil.R.Evid. 505(g)(2) is applicable when the Government needs to limit or prevent disclosure.

(2) **Limited Disclosure.** The military judge, upon motion of the Government, shall authorized [sic] (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and shall not be disclosed to the accused.

In making a motion to prevent or limit disclosure of classified information,

"the Government shall submit the classified information for examination only by the military judge and shall demonstrate by affidavit that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation." Mil.R.Evid. 505(i)(3). Once the Government has met this standard, then the "military judge shall determine whether the information may be disclosed at the court-martial proceeding." Mil.R.Evid. 505(i)(4).

*Id.* at 856-7. Thus, as *Lonetree* makes clear, if the Government is moving for an *in camera* review under MRE 505(g)(2), it must submit the classified evidence and an affidavit *ex parte* demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security. Based on the Government's motion, it does not appear that the Government has submitted to the Court an affidavit demonstrating why the information reasonably could be expected to cause damage to the national security.

7. Once a judge determines that the Government has met the standard in MRE 505(i)(3), the Government must provide notice to the accused of the information that will be at issue in the *in camera* proceeding. MRE 505(i)(4)(A) provides:

Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an *in camera* proceeding. Prior to the *in camera* proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings.

8. The procedures of MRE 505(i)(4)(A) envision the Government filing a non-*ex parte* filing in a generic form. The rule places within the control of the military judge the form and substance of this generic filing. The analysis to the MRE 505(i) states that the Government may describe the information in a generic fashion. *See* Analysis of MRE 505(i) at A22-41. However, the generic description is subject to approval by the military judge. If the generic description by the Government is not "sufficiently specific to enable the defense to proceed during the *in camera* session, the military judge may order the government to release the information for use during the proceeding or face the sanctions under subdivision (i)(4)(E)." *Id.*

9. The Defense cannot be expected to respond to the Government's motion in a vacuum. The Government must file a non-*ex parte* version of its motion under MRE 505(i)(4)(A). This version must be approved by the military judge. *Id.* Additionally, the Government should be

required to provide its proposed substitutions to enable the Defense to adequately proceed during the *in camera* session. Analysis of MRE 505(i) at A22-41.

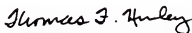
10. Without this documentation, the Defense will be unable to adequately respond and proceed within the *in camera* proceeding. Currently, the Defense has no idea what type of substitution the Government is requesting. The Defense does not know if the Government is requesting a total substitution or partial substitution to the document. Is the Government requesting that the information within the damage assessments be rewritten to be more general? Is the Government requesting that certain information within the damage assessments be eliminated or obscured? Is the Government requesting a summary be substituted for the information within the damage assessments? If so, what is the basis for the requested substitution? Additionally, the Government states that the motion "outlines other equity holders outside of military authorities that request certain redactions or summaries of their information." Is the request by "other equity holders" in addition to the substitution under MRE 505(g)(2) or is this an assertion of privilege under MRE 505(c)?

11. In short, the Defense needs more information than it currently has in order to participate in this aspect of the case. Accordingly, the Defense requests that the Court order the Government to file a non-*ex parte* version of its motion for substitutions IAW MRE 505(i)(4)(A). The Defense requests that the Court review this filing to ensure that it is sufficiently specific to enable the Defense to proceed during the *in camera* session. If not, the Defense requests that the Court order the Government to release a copy of its *ex parte* motion and the classified information for use during the proceeding. If the Government refuses, the Defense requests appropriate sanctions under MRE 505(i)(4)(E).

#### CONCLUSION

12. In accordance with the above, the Defense requests that the Court order the Government to file a non-*ex parte* version of its motion for substitutions IAW MRE 505(i)(4)(A).

Respectfully submitted,



THOMAS F. HURLEY  
MAJ, JA  
Defense Counsel



DAVID E. COOMBS  
Civilian Defense Counsel

# ATTACHMENT

-----Original Message-----

From: Hurley, Thomas F MAJ USARMY (US)

Sent: Tuesday, May 22, 2012 12:39 PM

To: Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USARMY (US)

Cc: David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D Jr CW2 USARMY (US); Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV (US)  
Subject: RE: Ex Parte Requests by the Government (UNCLASSIFIED)

Ma'am

Understood. The defense will file a motion for the relief it requests from the Court.

v/r  
tfh

-----Original Message-----

From: Lind, Denise R COL USARMY (US)

Sent: Tuesday, May 22, 2012 11:08 AM

To: Hurley, Thomas F MAJ USARMY (US); Fein, Ashden MAJ USARMY (US)

Cc: David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D Jr CW2 USARMY (US); Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV (US)  
Subject: RE: Ex Parte Requests by the Government (UNCLASSIFIED)

Counsel,

If a party wants the Court to act, the party must submit a motion with relevant authority supporting the action requested.

D

Denise R. Lind  
COL, JA  
Chief Judge, 1st Judicial Circuit



-----Original Message-----

From: Hurley, Thomas F MAJ USARMY (US)

Sent: Monday, May 21, 2012 5:41 PM

To: Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USARMY (US)

Cc: David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S. 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D Jr CW2 USARMY (US); Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV (US)

Subject: Ex Parte Requests by the Government (UNCLASSIFIED)

Ma'am,

The Defense intends to file a reply motion to the Government's ex parte request for substitutions under MRE 505(g)(2). The trial calendar indicates that the Defense response motion is due NLT COB 29 May 2012. In order to comply with that deadline, the Defense requests that the Court order the Government to provide the Defense with a non-ex parte version of its motion(s). The defense also requests that the Court order the Government to provide a copy of its proposed substitutions.

The Defense cannot be expected to respond to the Government's motions in a vacuum. The non-ex parte versions of the Government's motions and the proposed substitutions will enable the Defense to fully brief the issue for the Court.

Without this documentation, the Defense is unable to adequately respond. For instance: What type of substitution is the Government requesting? Are they requesting partial substitutions to the document, but still providing the rest to the Defense? If so, what is the basis for the partial substitution? Are they requesting a complete substitution for the document? If so, what is that basis? Additionally, the Government states that the motion "outlines other equity holders outside of military authorities that request certain redactions or summaries of their information." Is this request in addition to the substitution or is this request a request under MRE 505(g)(2)?

In short, in order to respond, the Defense needs something to be able to respond to. As such, we request that you direct the Government to file a non-ex parte version of its motion(s) for substitutions under MRE 505(g)(2).

v/r

MAJ Hurley

Thomas F. Hurley

MAJ, JA

US Army Defense Counsel Assistance Program

[thomas.f.hurley4.mil@mail.mil](mailto:thomas.f.hurley4.mil@mail.mil) (work email)

[thomashurley1@me.com](mailto:thomashurley1@me.com) (iPhone email)

703.693.0327 (office)

223.0327 (DSN office)

703.209.8061 (cell)

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

**Prosecution Request  
for Leave to Respond to  
the Defense's Motion to Require  
Non-Ex Parte Filing by Government**

**23 May 2012**

1. The United States requests leave of the Court to respond to the Defense Motion to Require Non-Ex Parte Filing by Government, dated 22 May 2012 until 29 May 2012. On 22 May 2012, the Court ordered, via email, the United States to respond by close of business (COB) on Thursday, 24 May 2012.
2. On 23 March 2012, the Court ordered the United States to "disclose all classified information from the 3 damage assessments **to the Court** for *in camera* review IAW RCM 701(g)(2) or, at the request of the Government, *in camera* review for limited disclosure under MRE 505(g)(2)." See Appellate Exhibit XXXVI (emphasis added). Since that date, the defense has had adequate time to prepare a motion to request the Court not to consider material *ex parte*, especially since they were on notice that the Court ordered the classified information to be disclosed to the Court and not to the defense and the Court. On 18 May 2012, pursuant to the Court's order, the United States disclosed to the Court the material through an *ex parte* motion for an *in camera* review under MRE 505(g)(2). See Government's Response to Court Discovery Order, dated 18 May 2012 (not yet marked as an Appellate Exhibit).
3. The defense waited until 21 May 2012 and then contested via email the process that the Court outlined in its 23 March 2012 order and the United States followed on 18 May 2012, by stating they intended to file a reply to the Government's Response to Court Discovery Order, according to the trial calendar. See Enclosure. However, the trial calendar does not contemplate any response by the defense for a Government MRE 505(g)(2) filing, but rather a response to a Government Filing IAW MRE 505(i), if any. See Appellate Exhibit LXX. Then, at 1704 hours on 22 May 2012, the defense filed its unscheduled Motion to Require Non *Ex-Parte* Filing by Government.
4. The Court, with the concurrence of both parties, established a two week filing, two week response, five day reply, and one week Court preparation schedule for all motions. See Appellate Exhibit LXX. On 10 May 2012, the defense filed five motions totaling 68 pages. Only three of these motions were filed according to the Court's Scheduling Order. One motion was filed early (Brady ID Motion) and the other motion included a significant amount of material outside the scope of the Court's Order (Compel Discovery #2). Regardless, the United States is following the Court's Scheduling Order and working to complete its responses which are due tomorrow, 24 May 2012.
5. The United States requests at least two additional duty days to respond to the defense's motion and for the response to be due by COB on 29 May 2012. This will allow the prosecution to complete its responses to the scheduled motions and then to adequately research and respond

to the defense's newest motion. The Government's request will not necessitate any delay in the proceedings; as such, there will be no prejudice to the defense.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

Enclosure  
Email Chain, dated 22 My 2012

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 23 May 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

) ) ) ) ) ) ) ) ) )

 $\gamma$ 

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**Prosecution Request  
for Leave to Respond to  
the Defense's Motion to Require  
Non-Ex Parte Filing by Government**

**Enclosure**

23 May 2012

**From:** Hurley, Thomas F MAJ USARMY (US)  
**To:** Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USA JFHQ-NCR/MDW SJA  
**Cc:** David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M, CPT USA JFHQ-NCR/MDW SJA; Whyte, Jeffrey H, CPT USA JFHQ-NCR/MDW SJA; von Elten, Alexander S, CPT USA JFHQ-NCR/MDW SJA; Ford, Arthur D, CW2 USA JFHQ-NCR/MDW SJA; Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV (US)  
**Subject:** RE: Ex Parte Requests by the Government (UNCLASSIFIED)  
**Date:** Tuesday, May 22, 2012 12:39:18 PM

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Classification: UNCLASSIFIED

Caveats: NONE

Ma'am

Understood. The defense will file a motion for the relief it requests from the Court.

v/r  
tfh

-----Original Message-----

**From:** Lind, Denise R COL USARMY (US)  
**Sent:** Tuesday, May 22, 2012 11:08 AM  
**To:** Hurley, Thomas F MAJ USARMY (US); Fein, Ashden MAJ USARMY (US)  
**Cc:** David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S, 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D Jr CW2 USARMY (US); Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV (US)  
**Subject:** RE: Ex Parte Requests by the Government (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Counsel,

If a party wants the Court to act, the party must submit a motion with relevant authority supporting the action requested.

D

Denise R. Lind  
COL, JA  
Chief Judge, 1st Judicial Circuit

-----Original Message-----

**From:** Hurley, Thomas F MAJ USARMY (US)  
**Sent:** Monday, May 21, 2012 5:41 PM  
**To:** Lind, Denise R COL USARMY (US); Fein, Ashden MAJ USARMY (US)  
**Cc:** David Coombs; Tooman, Joshua J CPT USARMY (US); Santiago, Melissa S CW2 USARMY (US); Morrow III, JoDean, CPT USA JFHQ-NCR/MDW SJA; Overgaard, Angel M CPT USARMY (US); Whyte, Jeffrey H CPT USARMY (US); VonElten, Alexander S, 1LT USA JFHQ-NCR/MDW SJA; Ford, Arthur D Jr CW2 USARMY (US); Jefferson, Dashawn MSG USARMY (US); Lykes, Elias F CW4 USARMY (US); Prather, Jay R CIV

(US)

Subject: Ex Parte Requests by the Government (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Ma'am,

The Defense intends to file a reply motion to the Government's ex parte request for substitutions under MRE 505(g)(2). The trial calendar indicates that the Defense response motion is due NLT COB 29 May 2012. In order to comply with that deadline, the Defense requests that the Court order the Government to provide the Defense with a non-ex parte version of its motion(s). The defense also requests that the Court order the Government to provide a copy of its proposed substitutions.

The Defense cannot be expected to respond to the Government's motions in a vacuum. The non-ex parte versions of the Government's motions and the proposed substitutions will enable the Defense to fully brief the issue for the Court.

Without this documentation, the Defense is unable to adequately respond. For instance: What type of substitution is the Government requesting? Are they requesting partial substitutions to the document, but still providing the rest to the Defense? If so, what is the basis for the partial substitution? Are they requesting a complete substitution for the document? If so, what is that basis? Additionally, the Government states that the motion "outlines other equity holders outside of military authorities that request certain redactions or summaries of their information." Is this request in addition to the substitution or is this request a request under MRE 505(g)(2)?

In short, in order to respond, the Defense needs something to be able to respond to. As such, we request that you direct the Government to file a non-ex parte version of its motion(s) for substitutions under MRE 505(g)(2).

v/r

MAJ Hurley

Thomas F. Hurley  
MAJ, JA  
US Army Defense Counsel Assistance Program  
thomas.f.hurley4.mil@mail.mil (work email)  
thomashurley1@me.com (iPhone email)  
703.693.0327 (office)  
223.0327 (DSN office)  
703.209.8061 (cell)

Classification: UNCLASSIFIED

Caveats: NONE


Classification: UNCLASSIFIED

Caveats: NONE

Classification: UNCLASSIFIED  
Caveats: NONE

## UNITED STATES

Y.

**MANNING, Bradley E., PFC**  
U.S. Army, xxx-xx-  
Headquarters and Headquarters Company, U.S.  
Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

**DEFENSE RESPONSE TO  
PROSECUTION REQUEST FOR  
LEAVE TO RESPOND TO THE  
DEFENSE'S MOTION TO  
REQUIRE NON-EX PARTE  
FILING**

23 May 2012

1. PFC Bradley Manning, by and through the undersigned Defense counsel, opposes the Government's request for leave of Court to respond to the Defense Motion to Require Non-*Ex Parte* Filing by Government until 29 May 2012. The Defense requests that the Court order the Government to respond by 24 May 2012.

2. As the moving party, the Government has the burden of persuasion. RCM 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

3. On 18 May 2012, the Government filed an *in camera* motion for substitutions under MRE 505(g)(2). On 21 May 2012, the Defense requested by e-mail that the Court order the Government to file a non-*ex parte* version of its motion. On 22 May 2012, the Court requested the Defense to file a written motion in support of its request. The Defense complied with the Court's request on that same day.

1



## ARGUMENT

5. The relief requested by the Government: a) is based upon false assumptions and, b) does not provide the Court with enough time to properly adjudicate this matter during the next Article 39(a) session.

### A. The Government's False Assumptions

6. The Government asserts that the Defense "has had adequate time to prepare a motion to request the Court not to consider material *ex parte*, especially since they were on notice that the Court ordered the classified information to be disclosed to the Court and not to the defense and the Court." See Prosecution Request for Leave dated 23 May 2012 (emphasis in original). The Government clearly does not understand the Defense's motion.

7. The Defense is not requesting that the Court refuse to consider material *ex parte* from the Government. Instead, the Defense is simply requesting that the Government file, in addition to its *ex parte* filing to the Court, a separate non-*ex parte* filing to the Court and Defense as required by MRE 505(i)(4)(A). Such a filing is required in order to provide the Defense with the ability to participate in the *in camera* session with respect to the proposed redactions and substitutions. See Analysis to MRE 505(i)(4)(A).

8. The Government is also mistaken when it asserts that the Defense is contesting the process as the Court outlined in its 23 March 2012 Order. The Defense is not. The 23 March 2012 order contemplates a response by the Defense for a Government MRE 505(g)(2) filing. The Government's MRE 505(g)(2) filing falls under the procedure for *in camera* review IAW MRE 505(i). The Defense had assumed that a non-*ex parte* filing for the Defense would have accompanied the Government's 18 May 2012 filing with the Court. When it was clear the Government was not planning to file anything for the Defense to respond to, the Defense requested the Government to file the required non-*ex parte* version of its motion.

### B. Timing Issues Presented by the Government's Request

9. The Government requests almost a week to respond to a straightforward motion. The Defense cited one case (which had already been provided to the Court and the Government) and cited one subsection of MRE 505 in support of its motion. It should not take five prosecutors nearly a week to respond to the issue raised.

10. This matter needs to be resolved during the 39a sessions scheduled from 6-8 June 2012. Allowing the Government to delay filing their response until 29 May will compress the motion schedule prior to the next iteration court appearances. That compressed schedule will make it difficult, if not impossible, to litigate this motion in June. For instance, if the Court rules for the Defense on the necessity of a non-*ex parte* filing on 29 May, then the Government would likely ask for at least another 4 duty days to compose the non-*ex parte* filing. That request, if granted, would bring us to 4 June 2012, the same calendar week of the pre-trial hearings. Given that the Defense will be travelling during that time, with limited access to research materials and the

internet, it would not be able to respond (or respond adequately) to the Government's motion for redactions and substitutions.

CONCLUSION

11. In accordance with the above, the Defense requests that you order the Government to provide a response by the Court's original filing date of 24 May 2012. That way, this issue can be resolved at the upcoming motions argument.

Respectfully submitted,



THOMAS F. HURLEY  
MAJ, JA  
Defense Counsel



DAVID E. COOMBS  
Civilian Defense Counsel

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Response

to Defense Motion to Require  
Non-Ex Parte Filing  
by Government

28 May 2012

### RELIEF SOUGHT

The Government requests that the Court deny the Defense Motion to Require Non-Ex Parte Filing by Government (Defense Motion) because Military Rule of Evidence (MRE) 505, the Fifth Amendment to the United States Constitution (Fifth Amendment), and the Sixth Amendment to the United States Constitution (Sixth Amendment) do not support the defense's request to compel the Government to file a non-ex parte version of its MRE 505(g)(2) motion.

### BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial (MCM), United States, R.C.M. 905(c) (2012).

### FACTS

The United States stipulates to those facts cited in the defense motion.

### WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this response. On 18 May 2012, the United States submitted two classified motions *ex parte* (hereinafter "classified motions"). The United States respectfully requests that the Court consider the classified motions.

### LEGAL AUTHORITY AND ARGUMENT

The Court should not Order the Government to file a non-ex parte version of its motion because MRE 505(g)(2) explicitly provides for *ex parte* consideration with no response by the defense. Additionally, the defense confuses the Government's filing under MRE 505(g)(2) as a filing under MRE 505(i)(4)(A) and relies upon a case that is inapposite. The defense presents no legal authority to support its proposition that either the Fifth Amendment or the Sixth Amendment require filing of a non-ex parte version of the motion.

## I. BACKGROUND

MRE 505 is based on the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 (2012).<sup>1</sup> MCM MRE 505 analysis, at A22-41 (2012). MRE 505 is procedure-oriented, and states the procedures and standards for the use of classified information in a court-martial. See *United States v. Lonetree*, 31 M.J. 849, 856 (N.M.C.M.R. 1990, *aff'd*, 35 M.J. 396 (C.M.A. 1992). Additionally, MRE 505 attempts to balance the interests of an accused who desires classified information for his defense and the interests of the government in protecting that information. *Id.* Specifically, MRE 505(g)(2) is based on Section 4 of the CIPA. Compare MRE 505(g)(2) (authorizing deletion of specified items in classified information, substitution or summary of classified information, or substitution of statements admitting relevant facts that classified information would tend to prove) with Section 4 of the CIPA (authorizing deletion of specified items in classified information, a substitution of a summary of classified information, or substitution of statements admitting relevant facts that the classified information would tend to prove). The purpose of the CIPA and MRE 505 is to protect classified information at any stage of a court-martial. See *United States v. O'Hara*, 301 F.3d 563, 568 (7th Cir. 2002).

## II. MRE 505(G)(2) EXPLICITLY PROHIBITS DISCLOSURE OF THE GOVERNMENT'S MOTION

MRE 505(g)(2) is derived from Section 4 of CIPA. See MCM MRE 505 analysis, at A22-42 (2012). *Ex parte* reviews of classified information are permitted when a statute expressly provides for such reviews. *United States v. Libby*, 429 F.Supp.2d 18, 21 (D.D.C. 2006). Section 4 of CIPA provides a mechanism for the Government to move *ex parte* and *in camera* to limit discovery of certain classified information. See *United States v. Sarkissian*, 841 F.2d 959, 965 (9<sup>th</sup> Cir. 1988). "The legislative history emphasizes that 'since the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge would defeat the very purpose of the discovery rules.'" *Id.* (quoting H.R. Rep. No. 831, 96th Cong., 2d Sess. 27 n. 22). CIPA does not require the Government to invoke the privilege before the Court may grant a request to proceed *ex parte* and *in camera*. See *id.* at 965-66; *United States v. Pringle*, 751 F.2d 419, 426-27 (1st Cir. 1984). Moreover, under Section 4 of CIPA, a defendant's absence from the *ex parte* review does not unfairly prejudice him, nor would it unfairly prejudice an accused under MRE 505(g)(2). See generally *United States v. Mejia*, 448 F.3d 436, 458 (D.C. Cir. 2006) (discussing close analogies where the defendant is not entitled to access the evidence reviewed by the court *in camera*, including disclosures under the Jencks Act, 18 U.S.C. § 3500(b) (2012) and *Brady v. Maryland*, 373 U.S. 83 (1963)).

Motions submitted by the Government under MRE 505(g)(2), upon the Government's request, shall not be disclosed to the accused. MRE 505(g)(2) (stating in relevant part, "The Government's motion and any materials in support thereof . . . shall not be disclosed to the accused."). Similarly, Section 4 of the CIPA also permits *ex parte* submissions. *Libby*, 429 F.Supp.2d at 22 (determining that Section 4's permits *ex parte* submissions because it permits

<sup>1</sup> The CIPA was written to combat "graymail," which entailed a defendant in a criminal case seeking disclosure of sensitive national security information to discourage the Government from continuing prosecution. See MCM MRE 505 analysis, at A22-41 (2012).

the government to submit written statements to be inspected by the court alone, upon a showing of good cause). Here, the Government submitted the classified motions under MRE 505(g)(2). As in *Libby*, the Government submits the classified motions to the Court, under MRE 505(g)(2). Accordingly, the plain meaning of MRE 505(g)(2) provides that the Defense Motion should be denied.

### III. LONETREE DOES NOT PROHIBIT EX PARTE SUBMISSIONS UNDER MRE 505(G)(2)

The defense argues that under MRE 505(i)(4)(A), the Government must provide a non-*ex parte* version of its motion. The Government agrees that, if the United States moves for an "*in camera* proceeding" under MRE 505(i)(4)(A), that it must provide the defense notice and that notice typically comes in the form of a motion. However, the defense's argument and the Government's agreement is inapplicable to the issue at bar, because the Government has not invoked the classified information privilege and filed a motion under MRE 505(i)(4)(A), but sought authorization of a limited disclosure under MRE 505(g)(2). MRE 505(i) only applies to "*in camera* proceedings" which are only applicable to the (i) subdivision of MRE 505 and not other subdivisions, such as MRE 505(g)(2). See MRE 505(i)(1).

The defense argues that *Lonetree* requires *ex parte* motion submissions under MRE 505(g)(2) be subject to the procedures outlined in MRE 505(i). See Defense Motion ¶ 6. As noted above, application of this argument necessitates ignoring the procedures explicitly stated in MRE 505(g)(2). Compare MRE 505(g)(2) (describing the procedure for and conditions of limited disclosure) with MRE 505(i)(1)-(3) (stating the procedure for an "*in camera* proceeding" concerning the use of classified information). Ultimately, the defense seems to confuse the Court's ability to conduct an *in camera* and *ex parte* review under MRE 505(g)(2) with an "*in camera* proceeding" under MRE 505(i), which are completely different processes under different subdivisions of MRE 505.

*Lonetree* does not apply to this issue because that case concerned the *use* of classified information at trial by a witness under MRE 505(i), not the submission of an *ex parte* motion concerning discovery under MRE 505(g)(2). See *Lonetree*, 31 M.J. at 855-56. MRE 505(i)(1)-(3) sets forth procedures concerning the use of classified information at proceedings. See MRE 505(i)(2) (stating that the Government may move under the rule for an *in camera* proceeding concerning the use at any proceeding of any classified information) (emphasis added); *Lonetree* 31 M.J. at 856 (discussing the government motion to prevent disclosure of classified information to preclude cross-examination). In *Lonetree*, the government sought to prevent disclosure of classified information relating to a witness to preclude certain cross-examination regarding the classified information. *Lonetree*, 31 M.J. at 856. The potential use of classified information in *Lonetree* required a motion under MRE 505(i)(2) concerning its use at a proceeding. In comparison, MRE 505(g)(1)-(2) set forth procedures regarding protective orders and limited disclosure, including disclosures outside proceedings where the Government agrees to disclose classified information to the defense, either in original form under MRE 505(g)(1) or in a limited manner under MRE 505(g)(2). Because MRE 505(i)(2)'s applicability is limited to use at

proceedings and invocation of the classified information privilege, its requirements cannot apply to voluntary limited disclosures under MRE 505(g).<sup>2</sup>

### CONCLUSION

For the foregoing reasons, the United States requests the Court to deny the Defense Motion to Require Non-*Ex Parte* Filing by Government for limited disclosure of classified information motions under MRE 505(g)(2).

//Original Signed//  
ALEXANDER von ELTEN  
CPT, JA  
Assistant Trial Counsel

//Original Signed//  
ASHDEN FEIN  
MAJ, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 28 May 2012.


//Original Signed//  
ASHDEN FEIN  
MAJ, JA  
Trial Counsel

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<sup>2</sup> Although the dicta cited by the defense in *Lonetree* suggests that MRE 505(i)(3)-(4) applies to MRE 505(g)(2), the U.S. Navy-Marine Corps Court of Military Review does not distinguish in its dicta between motions concerning limiting the use of information at a proceeding and motions concerning limiting disclosure for purposes of discovery. Additionally, the U.S. Court of Military Appeals chose not to rule on MRE 505's application. The United States argues the dicta should not be applied beyond the facts of *Lonetree*. Accordingly, *Lonetree* stands for the proposition that MRE 505(i) only applies to the Government invoking the privilege to and preventing disclosures of classified information at any proceeding. Additionally, if the Court rules that a substitution is not adequate under MRE 505(g)(2), then the Government may seek to invoke the privilege under MRE 505(c), which would then likely cause a motion for an *in camera* proceeding, under MRE 505(i).

## UNITED STATES

v.

**MANNING, Bradley E., PFC**  
U.S. Army, xxx-xx-  
Headquarters and Headquarters Company, U.S.  
Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

**DEFENSE REPLY TO  
PROSECUTION RESPONSE TO  
DEFENSE MOTION TO  
REQUIRE NON-EX PARTE  
FILING BY GOVERNMENT**

29 May 2012

1. In accordance with the Rules for Courts Martial (RCM) 905, Military Rule of Evidence (MRE) 505, Manual for Courts-Martial (MCM), United States, 2008; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court require the Government to file a non-*ex parte* version of its motion for substitutions under MRE 505(g)(2) IAW MRE 505(i)(4)(A).

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

3. The defense has no additional evidence for the Court to consider along with this reply.

4. The defense has no additional facts for the Court to consider along with this reply.

5. There is no additional legal authority for the Court to consider along with this reply.

## ARGUMENT

6. It is important to note that the defense does not seek the disclosure of the Government's Motions for Substitution to the Court. We seek only a non-ex parte summary of those motions. That non-ex parte summary will then allow the defense to (1) better understand the decision the Court is making with regard to the potential substitutions and (2) provide input on that decision to the Court.

7. It must also be noted that the government's declaration of privilege is immaterial to the claim of the defense. It is the position of the defense that, if the government seeks substitutions of privileged material under MRE 505(g), then it must provide a non-privileged summary of the action it requests to the defense.

8. The construct of the Navy-Marine Corps Court of Military Review's decision in US v. Lonetree, 31 M.J. 949 (NMCMR 1990) is not dicta. It is controlling. In Lonetree, the government sought the Limited Disclosure protections of MRE 505(g)(2). The NMCCMR held that MRE 505(i)'s procedures "contains the standard to be employed by the military judge to determine when classified information must be disclosed to the defense." One of those procedures is the standard in MRE 505(i)(4), another is the government's demonstration of national security nature of the information in MRE 505(i)(3), and another is the overall procedure described in MRE 505(i)(4)(A). The last procedure contains the relief we seek – a non-ex parte disclosure by the government which allows the defense to participate in the process with the Court.

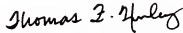
9. The government's reliance on certain federal cases provides little direct assistance to the Court. After all, Article 46, UCMJ, provides a military accused with greater discovery rights than those enjoyed by his civilian counterparts. More helpful is the treatment of those cases by the military appellate courts. Consider the Court of Military Appeals opinion in Lonetree (US v. Lonetree, 35 M.J. 396 (CMA 1992)), it failed to see a meaningful distinction between a claim of privilege during discovery and one made during trial. See Lonetree, 35 M.J. at 409 n.10 (citing US v. Sarkissian, 841 F.2d 959 (9<sup>th</sup> Cir. 1988) and US v. Yunis, 867 F.2d 617 (DC Cir. 1989). Thus, the government's parsing of MRE 505 between *in camera* reviews under MRE 505(g) (discovery) and *ex parte* proceedings under MRE 505(i) (confrontation) is one not shared by the highest military court.



CONCLUSION

10. In accordance with the above, the Defense requests that the Court order the Government to file a non-*ex parte* version of its motion for substitutions IAW MRE 505(i)(4)(A).

Respectfully submitted,



THOMAS F. HURLEY  
MAJ, JA  
Defense Counsel



DAVID E. COOMBS  
Civilian Defense Counsel

## UNITED STATES

v.

U.S. Army, xxx-xx-

Headquarters and Headquarters Company, U.S. Army  
Garrison, Joint Base Myer-Henderson Hall, Fort Myer,  
VA 22211

**RULING: DEFENSE MOTION:  
NON-EX PARTE  
FILING BY GOVERNMENT**

29 May 2012

1. MRE 505(g) (*Disclosure of Classified Information to the Accused*) provides procedures when the Government agrees to voluntarily disclose classified information to the Defense.

2. MRE 505(g)(2) (*Limited Disclosure*) mandates that the Military Judge, upon motion of the Government, shall authorize:

- a) Deletion of specific items of classified information from documents to be made available to an accused;
- b) Substitution of a portion or summary of the information for such documents; or
- c) Substitution of a statement admitting relevant facts;

unless the Military Judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the Military Judge *in camera* and shall not be disclosed to the accused.

3. Defense cites the Navy-Marine Court of Military Review's decision in *U.S. v. Lonetree*, 31 M.J. 849 (N-M-C.M.R. 1990), aff'd 35 M.J. 396 (C.M.A. 1992) for the proposition that *in camera* review for substitutions under MRE 505(g)(2) are controlled by the procedures outlined in MRE 505(i). *Lonetree*, 31 M.J. at 857.

4. MRE 505(g)(2) provides specified procedures when the Government voluntarily discloses classified information but seeks a limited disclosure of that information to the Defense. The Government is not required to make a claim of privilege prior to making an motion for limited disclosure IAW MRE 505(g)(2). Nothing in MRE 505(g)(2) states that an *in camera* proceeding under MRE 505(i) is required

for a voluntary limited disclosure of classified information by the Government. Other provisions of MRE 505 identify when *in camera* proceedings under MRE 505(i) apply. See MRE 505(f) (MRE 505(i) applies when the Government has invoked a claim of privilege under MRE 505(c)), MRE 505(g)(3)(B) (invoking MRE 505(i) where a privilege has been invoked under RCM 914), and MRE 505(h)(4) (prohibiting the Defense from disclosing classified information until the Government has been afforded a reasonable opportunity to seek a determination under MRE 505(i)).

5. MRE 505(g)(2) is derived from Section 4 of the Classified Information Procedures Act (CIPA). See MCM, MRE 505(g)(2) analysis, A22-24. Federal courts interpret Section 4 of the CIPA as authorizing the Government to provide *ex parte* filings to the Court for limited disclosure without invoking a claim of privilege. See *U.S. v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006).

6. MRE 505(i) does not apply to voluntary limited disclosure by the Government of classified information. The procedures of MRE 505(g)(2) apply. To the extent the Navy – Marine Court of Criminal Appeals in *Lonetree* states otherwise, the Court disagrees.

7. The 18 May 2012 Prosecution Disclosure to the Court provides the Defense and the public with notice of what *in camera* motions the Government intends to file. In order to ensure the Defense and the public have notice of the general nature of the proposed substitutions proposed by the Government and the national security interest the Government seeks to protect with the substitutions, the Government shall file an unclassified redacted version of its *ex parte* motions. The Government is not required to submit the proposed substitutions to the Defense.

8. On 14 February 2012, Defense filed an *ex parte* supplement for the Court to consider in ruling on the Defense Motion to Compel Discovery (AE IX). On 15 March 2012, the Court ruled it would not consider the *ex parte* supplement when deciding the Defense Motion to Compel Discovery but that the Court would consider the *ex parte* supplement at the request of the Defense when conducting *in camera* reviews IAW MRE 505.

9. Defense will advise the Court by 1 June 2012 if the Defense desires the Court to consider the *ex parte* supplement when conducting the MRE 505(g)(2) *in camera* reviews requested by the Government.

#### **RULING:**

1. The Defense motion to require the Government to submit non-*ex parte* affidavits is **GRANTED IN PART**. The Government will provide the Court and the Defense with an unclassified redacted version of its *ex parte* motion NLT 30 May 2012 that describes the general nature of the proposed substitutions and the national security interest the Government seeks to protect with the substitutions.

2. Defense will advise the Court NLT 1 June 2012 if the Defense requests the Court to consider the *ex parte* supplement when conducting the MRE 505(g)(2) *in camera* reviews.

**ORDERED:** This 29th day of May 2012.



DENISE R. LIND  
COL, JA  
Chief Judge, 1<sup>st</sup> Judicial Circuit

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

**DEFENSE PROPOSED CASE  
MANAGEMENT ORDER**

22 May 2012

1. The Court is currently scheduling Article 39(a) sessions with the following default schedule at the request of the parties: two weeks for parties to file motions; two weeks for parties to file responses; five days for parties to file replies; and one week for the Court to review all pleadings before the start of the motions hearing.

a. Phase 1. Immediate Action (21 February 2012 - 16 March 2012)

b. Phase 2(a). Legal Motions excluding Evidentiary Issues (29 March 2012 - 26 April 2012)

c. Phase 2(b). Legal Motions (10 May 2012 - 8 June 2012)

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 29 May 2012
- (D) Article 39(a): 6-8 June 2012

- (1) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 793(c)
- (2) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 1030(a)(1)
- (3) Government and Defense Motions for Proposed Lesser Included Offenses
- (4) Defense Motion to Compel Discovery #2 and to Compel ONCIX, DOS, FBI investigation IAW RCM 701(a)(2)
- (5) Government Motion to Reconsider Motion to Compel DOS Damage Assessment
- (6) Defense Motion to Compel Brady Identification within Discovery
- (7) Updated Proposed Case Calendar
  - (A) Filing: 24 May 12
  - (B) Response: 29 May 12

**(8) Disclosure of Unclassified Results of 3 Damage Assessment Searches to Defense in Response to the Court's Ruling, 30 March 2012**

(A): 18 May 2012

**(9) Disclosure under RCM 701(g)(2) or MRE 505(g)(2) of all Information (Unclassified and Classified) to the Court in Response to the Court's Ruling, 30 March 2012**

(A): 18 May 2012

**(10) Government Filing for In Camera Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling, 30 March 2012 (Disclosure Issues)**

(A): Filing: 18 May 2012

(B): Response: 29 May 2012

(C): Reply: N/A

(D): Article 39(a): 6-8 June 2012

**(11) Court Rulings based on *in camera* review of damage assessments**

(A): Article 39(a): 6-8 June 2012

**d. Phase 3a. Evidentiary Issues (22 June 2012 - 20 July 2012)**

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 16-20 July 2012

**(1) Defense Motion to Compel Discovery #3 (if any)**

**(2) Government Motion to Compel Discovery (if any)**

**(3) Motions *in Limine* (Evidence Discovered to Date)**

**(4) Motions to Suppress (Evidence Discovered to Date)**

**(5) Pre-Authenticate/Pre-Admit Evidence<sup>1</sup>**

**(6) Requests for Judicial Notice**

**(7) Witness Lists Exchanged**

(A) Filing: 22 June 2012

(B) Government Objection to Defense Witnesses: 6 July 2012

(C) Motion to Compel Production: 11 July 2012

(D) Response: 13 July 2012

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<sup>1</sup> At the Court's direction, the Government needs to provide some basis indicating that they do not need to also authenticate before the members.

- (8) **Proposed Members Instructions for all Charged Offenses**
- (9) **Defense Motion to Compel Experts**
  - (A) Filing: 11 July 2012
  - (B) Response: 13 July 2012
- (10) **Defense Motion to Compel Witnesses**
  - (A) Filing: 11 July 2012
  - (B) Response: 13 July 2012
- (11) **Defense Notice of Intent to Disclose Classified Information under MRE 505(h)(1) (For Discovery Received – Motion to Compel #1)**
  - (A) Filing: 22 June 2012
- (12) **Defense Notice of Plea/Forum**
  - (A) Filing: 11 July 2012
- (13) **Updated Proposed Case Calendar**
  - (A) Filing: 6 July 2012
  - (B) Response: 11 July 2012
- (14) **Proposed Questionnaires** – the parties will confer and arrive at a questionnaire Before the Article 39(a) session 16-20 July 2012. Issues of disagreement will be addressed at the Article 39(a) session where the questionnaire will be approved and submitted to detailed members and alternates for response NLT 3 August 2012.
- c. **Phase 3b. Evidentiary Issues (3 August 2012 – 31 August 2012)**
  - (A) Filing: 3 August 2012
  - (B) Response: 17 August 2012
  - (C) Reply: 22 August 2012
  - (D) Article 39(a): 27-31 August 2012
- (1) **Motions *in Limine* (Classified Information not previously Disclosed)**
- (2) **Motions to Suppress (Classified Information not previously Disclosed)**
- (3) **Article 13**
  - (A) Filing: 27 July 2012<sup>2</sup>
  - (B) Response: 17 August 2012
  - (C) Reply: 22 August 2012
  - (D) Article 39(a): 27-31 August 2012

<sup>2</sup> The filing date of one week earlier for the Defense motions is to give the United States the necessary time to respond.

**(4) Speedy Trial, including Article 10**

- (A) Filing: 27 July 2012<sup>3</sup>
- (B) Response: 17 August 2012
- (C) Reply: 22 August 2012
- (D) Article 39(a): 27–31 August 2012

**(5) Pre-Qualify Experts**

**(6) Government Filing for In Camera Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling, 30 March 2012 (Use as Evidence) and Government Filing for In Camera Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling regarding Defense Motion to Compel Discovery #2 and #3 and Other Remaining Litigation Concerning MRE 505(h) and MRE 505(i)**<sup>4</sup>

- (A) Filing: 3 August 2012<sup>5</sup>
- (B) Response: 10 August 2012
- (C) Article 39(a): 27–31 August 2012

**(7) Production of Compelled Discovery for Defense Motion to Compel Discovery #2 and #3 or Production of Limited Discovery under MRE 505(g)(2) or (3)**

**(8) Production of Compelled Discovery for Government Motion to Compel Discovery**

**(9) Defense Additional Witness List in light of Information in Defense Motion to Compel Discovery #2 and #3. Defense Notice of Intent to Disclose Classified Information under MRE 505(h) from Compelled Discovery.**<sup>6</sup>

- (A) Filing: 17 August 2012
- (B) Response: 22 August 2012

**(10) Updated Proposed Case Calendar**

- (A) Filing: 17 August 2012
- (B) Response: 22 August 2012

**f. Phase 4. Miscellaneous Motions (1 September 2012 – 21 September 2012)**

**(1) Any Additional Motion that does not have an Identified Deadline**

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<sup>3</sup> The filing date of one week earlier for the Defense motions is to give the United States the necessary time to respond.

<sup>4</sup> Government advised the Court will need 15 duty days to review discoverable material.

<sup>5</sup> The filing, response, and reply dates are in order to provide the Court with enough time to review the discoverable material.

<sup>6</sup> This assumes that the Government does not claim a privilege or file a request for an in camera proceeding IAW MRE 505(i).

- (A) Filing: 7 September 2012
- (B) Response: 14 September 2012
- (C) Article 39(a): 19-20 September 2012
- (2) **Grunden Hearing for all Classified Information**
  - (A) Filing: 7 September 2012
  - (B) Response: 14 September 2012
  - (C) Article 39(a): 19-20 September 2012
- (3) **Voir Dire Questions, Flyer, Findings/Sentence Worksheet, all CMCO**
  - (A) Filing for Court Review: 14 September 2012
  - (B) Article 39(a): 19-20 September 2012

g. **Phase 5. Trial by Members (20 September 2012 – 12 October 2012)**

- (1) Voir Dire: 21 September 2012
- (2) Trial: 24 September 2012 – 12 October 2012

Respectfully submitted,



DAVID EDWARD COOMBS  
Civilian Defense Counsel



UNITED STATES OF AMERICA )

v. )

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211 )

Prosecution Proposed  
Case Calendar  
Update

24 May 2012

1. The proposed calendar is based upon the same assumptions listed in the Prosecution Proposed Case Calendar (AE I), Prosecution Proposed Case Calendar Update (AE XX), Prosecution Proposed Case Calendar Update (AE XLV), and Prosecution Proposed Case Calendar Update Supplement (AE XLVI). To the extent these assumptions prove to be incorrect or too ambitious, the schedule will be correspondingly longer.

2. Prosecution Proposed Calendar.

a. Phase 1. Immediate Action (21 February 2012 - 16 March 2012)

b. Phase 2(a). Legal Motions, excluding Evidentiary Issues (29 March 2012 - 26 April 2012)

c. Phase 2(b). Legal Motions (10 May 2012 - 8 June 2012)

- (A) Filing: 10 May 2012
- (B) Response: 24 May 2012
- (C) Reply: 29 May 2012
- (D) Article 39(a): 6-8 June 2012

- (1) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 793(e)
- (2) Defense Motion to Dismiss All Charged Offenses under 18 U.S.C. 1030(a)(1)
- (3) Government and Defense Motion for Proposed Lesser Included Offenses
- (4) Defense Motion to Compel Discovery #2<sup>1</sup>

<sup>1</sup> This motion was on the Court Scheduling Order, dated 25 April 2012 (hereinafter "Court Scheduling Order"), as Defense Motion to Compel ONCIX, DOS, FBI investigation IAW RCM 701(a)(2); however, the scope of the motion is far beyond those three entities and RCM 701(a)(2), so the prosecution is referring to it as Defense Motion to Compel #2. If any of the information is determined discoverable, then additional time will be needed to determine what, if any, discovery exists. If discovery does exist and if it is classified, the organization owning the information will need time to either disclose, give limited disclosure, or claim a privilege. The Court may have to review additional information and the prosecution may need to request an *in camera* proceeding. For planning purposes and in this proposal, the prosecution included the timeline for this process in Phase 3b with the originally scheduled Motion to Compel #2 (which is now listed as Motion to Compel #3).

- (5) **Government Motion to Reconsider Motion to Compel DOS Damage Assessment**<sup>2</sup>  
(A) Filing: 26 April 2012

~~———— (6) **Defense Motion to Exclude Uncharged Misconduct (MRE 404(b))**~~

- (7) **Defense Motion to Compel Identification of *Brady* in Discovery**<sup>3</sup>

(8) **Defense Motion to Require Non-Ex Parte Filing by Government (MRE 505(i)(4)(A))**<sup>4</sup>

- (A) Filing: 22 May 2012  
(B) Response: 28 May 2012  
(C) Ruling: 29 May 2012  
(D) Government's Disclosure of Non-Ex Parte Version: 30 May 2012 (if required)

- (9) **Updated Proposed Case Calendar**

- (A) Filing: 24 May 2012  
(B) Response: 29 May 2012

(10) **Disclosure of Unclassified Results of 3 Damage Assessment Searches to Defense in Response to the Court's Ruling, 23 March 2012**

- (A) Filing: 18 May 2012

(11) **Disclosure under RCM 701(g)(2) or MRE 505(g)(2) of All Information (Unclassified and Classified) to the Court in Response to the Court's Ruling, 23 March 2012**

- (A) Filing: 18 May 2012  
(B) Response: 1 June 2012<sup>5</sup>

~~———— (12) **Government Filing for *In Camera* Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling, 23 March 2012**~~

- (13) **Court Rulings based on *In Camera* Review of Damage Assessments**<sup>6</sup>

- (A) Article 39(a): 6-8 June 2012

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<sup>2</sup> The prosecution submitted the Prosecution Motion to Reconsider Motion to Compel DOS Damage Assessment on 26 April 2012 and, based on the Court's ruling, dated 11 May 2012, no response or subsequent argument is necessary.

<sup>3</sup> This motion was scheduled for Phase 3a on the Court Scheduling Order, not Phase 2b.

<sup>4</sup> This motion was unscheduled. These dates were set by the Court's ruling on 24 May 2012.

<sup>5</sup> This date was set by the Court's ruling on 24 May 2012.

<sup>6</sup> If the Court rules that any of the proposed summaries under MRE 505(g)(2) are not acceptable, the prosecution will need additional time to obtain approval for a different substitution or invoke the privilege under MRE 505(c) and MRE 505(i).

**(14) Defense Production of Government Reciprocal Discovery Request**

(A) Date: 15 June 2012

**d. Phase 3a. Evidentiary Issues (22 June 2012 - 20 July 2012)**

(A) Filing: 22 June 2012

(B) Response: 6 July 2012

(C) Reply: 11 July 2012

(D) Article 39(a): 16-20 July 2012

(1) **Defense Motion to Compel Discovery #3<sup>7</sup> (if any)**

(2) **Government Motion to Compel Discovery (if any)**

(3) **Motions *in Limine* (Evidence Discovered to Date)**

(4) **Motions to Suppress (Evidence Discovered to Date)**

(5) **Preliminary Determinations on Admissibility/Pre-Admit Evidence<sup>8</sup>**

(6) **Requests for Judicial Notice**

(7) **Witness Lists Exchanged/Compel Witnesses & Experts**

(A) Filing: 22 June 2012

(B) Government Objection to Defense Witnesses: 6 July 2012

(C) Motion to Compel Production: 11 July 2012

(D) Response: 13 July 2012

(D) Article 39(a): 16-20 July 2012

(8) **Proposed Members Instructions for All Charged Offenses**

(9) **Defense Notice of its Intent to Offer the Defense of Alibi, Innocent Ingestion, or Lack of Mental Responsibility IAW RCM 701(b)(2)<sup>9</sup>**

(A) Filing: 22 June 2012

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<sup>7</sup> The defense filed Motion to Compel Discovery #2 in phase 2b, so this will be Motion to Compel Discovery #3. If any of the information is determined discoverable, then additional time will be needed to determine what, if any, discovery exists. If discovery does exist and if it is classified, the organization owning the information will need time to either disclose, give limited disclosure, or claim a privilege. The Court may have to review additional information and the prosecution may need to request an *in camera* proceeding. For planning purposes and in this proposal, the prosecution included the timeline for this process in Phase 3b.

<sup>8</sup> The prosecution plans on moving to pre-admit evidence that has MRE 902(11) attestations and seeking preliminary determinations on admissibility for summaries.

<sup>9</sup> The prosecution recommends this deadline, so the prosecution can prepare any additional witnesses and evidence by the secondary witness list and evidence production deadline of 3 August 2012.

**(10) Defense Notice of Intent to Disclose Classified Information under MRE 505(h)(1) (For Discovery Received)<sup>10</sup>**

(A) Filing: 22 June 2012

**(11) Defense Notice of Accused's Forum Selection and Notice of Pleas in Writing<sup>11</sup>**

(A) Date: 11 July 2012

**(12) Updated Proposed Case Calendar**

(A) Filing: 6 July 2012

(B) Response: 11 July 2012

**(13) Proposed Questionnaires**

(A) Filing: Parties will confer and arrive at a questionnaire before the Article 39(a) at 16-20 July 2012 session

(B) Article 39(a): Disagreements will be addressed at Article 39(a) at 16-20 July 2012 session

(C) Questionnaires to Detailed Members and Alternates: 24 July 2012

(D) Suspense for Detailed Members and Alternates to Respond to Questionnaires: 3 August 2012

**c. Phase 3b. Evidentiary Issues (27 July 2012 – 31 August 2012)**

(A) Filing: 3 August 2012

(B) Response: 17 August 2012

(C) Reply: 22 August 2012

(D) Article 39(a): 27-31 August 2012

(1) **Motions *in Limine* (Classified Information not previously Disclosed)**

(2) **Motions to Suppress (Classified Information not previously Disclosed)**

(3) **Article 13**

(A) Filing: 27 July 2012<sup>12</sup>

(4) **Speedy Trial, including Article 10**

(A) Filing: 27 July 2012<sup>13</sup>

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<sup>10</sup> The Court Scheduling Order contemplated that this disclosure would only apply to the results of Motion to Compel #1, but it should apply to all of the information disclosed until the point in time when the motion is due.

<sup>11</sup> If the accused selects a panel, the United States proposes the panel be notified no less than sixty days prior to trial, in order to coordinate for extended special duty and travel.

<sup>12</sup> The defense agreed to the filing date of one week earlier to give the United States the necessary time to respond.

<sup>13</sup> The defense agreed to the filing date of one week earlier to give the United States the necessary time to respond.

(5) Pre-Qualify Experts

~~(6) Government Filing for *In Camera* Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court's Ruling, 23 March 2012 (Use as Evidence)~~

(7) Other Remaining Litigation Concerning MRE 505(h) and MRE 505(i)<sup>14</sup>

- (A) Filing: 3 August 2012
- (B) Response: 10 August 2012<sup>15</sup>
- (C) Reply: N/A
- (D) Article 39(a): 27-31 August 2012

(8) Disclosure of Unclassified Results of Information from Motions to Compel Discovery #2 and #3

- (A) Filing: 3 August 2012

(9) Disclosure under RCM 701(g)(2) or MRE 505(g)(2) of All Information (Unclassified and Classified) to the Court in Response to Court Rulings for Motions to Compel Discovery #2 and #3 or Notification to the Court of Privilege under MRE 505(c)

- (A) Filing: 3 August 2012

(10) Government Filing for *In Camera* Proceeding IAW MRE 505(i) with Notice to Defense (if Privilege is Claimed) in Response to the Court Rulings for Motions to Compel #2 and #3 (if any)

- (A) Filing: 3 August 2012

(11) Disclosure of All Remaining Unclassified or Classified (under MRE 505(g)(1)) Brady Material and Disclosure under MRE 701(g)(2) or MRE 505(g)(2) of All Remaining Classified Brady Material<sup>16</sup>

- (A) Filing: 3 August 2012

(12) Production of Compelled Discovery for Government Motion to Compel Discovery

- (A) Date: 3 August 2012

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<sup>14</sup> This includes *in camera* proceedings for Defense Notice to Disclose Classified Information and/or the Government's Invocation of the Privilege for Merits and Sentencing Information.

<sup>15</sup> The adjusted date gives the Court additional time to review any discoverable material and was agreed to by the defense. The Government estimates the review will take no more than fifteen duty days to complete.

<sup>16</sup> This production is for all material that is not subject to Motions to Compel Discovery or Production. This review will require the same additional time of no more than fifteen duty days noted in Footnote #15. If the Court rules that any of the proposed summaries under MRE 505(g)(2) are not acceptable, the prosecution will need additional time to obtain approval for a different substitution.

**(13) Additional Witness List (Evidence Discovered Since 22 June 2012)<sup>17</sup>**

- (A) Filing: 13 August 2012
- (B) Government Objection to Defense Witnesses: 16 August 2012
- (C) Motion to Compel Production: 20 August
- (D) Response: 23 August 2012
- (D) Article 39(a): 27-31 August 2012

**(14) Defense Notice of Intent to Disclose Classified Information under MRE 505(h)(1) (Evidence Discovered Since 22 June 2012)<sup>18</sup>**

- (A) Date: 13 August 2012

**(15) Updated Proposed Case Calendar**

- (A) Filing: 17 August 2012
- (B) Response: 22 August 2012

**f. Phase 4. Miscellaneous Motions (13 September 2012 – 4 October 2012)<sup>19</sup>**

- (A) Filing: 13 September 2012
- (B) Response: 27 September 2012
- (C) Article 39(a): 3-4 October 2012

**(1) Any Additional Motion that does not have an Identified Deadline**

**(2) Grunden Hearing for All Classified Information**

**(3) Voir Dire Questions, Flyer, Findings/Sentence Worksheet, All CMCOS**

- (A) Filing for Court Review: 27 September 2012
- (B) Article 39(a): 3-4 October 2012

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<sup>17</sup> The prosecution changed the name from the Court Scheduling Order (Defense Additional Witness List in light of Information in Defense Motion to Compel Discovery #2) to account for all of the discovery since the last witness list versus just discovery disclosed as the result of the motions to compel, as well as the potential need for any additional prosecution witnesses in response to the Defense Notice of its Intent to Offer the Defense of Alibi, Innocent Ingestion, or Lack of Mental Responsibility and discovery received from the defense. The prosecution also shifted the dates to allow the defense time to review any discovery from the 3 August 2012 disclosure and still litigate the additional witnesses at the Article 39(a) that begins on 27 August 2012.

<sup>18</sup> The prosecution changed the name from the Court Scheduling Order (Defense Notice of Intent to Disclose Classified Information under MRE 505(h) from Compelled Discovery #2) to account for all of the discovery since the last notice versus just discovery disclosed in a motion to compel. The prosecution also shifted the filing date to allow the defense time to review any discovery from the 3 August 2012 disclosure.

<sup>19</sup> There have been numerous unplanned motions submitted throughout the pre-trial process. The prosecution, therefore, anticipates that several pretrial motions will be filed under the "Any Additional Motion" timeframe. To plan for this likely contingency, the prosecution allotted more time for this phase than the Court Scheduling Order but still used a condensed version of the default schedule (two weeks for parties to file motions, two weeks for parties to file responses, five days for parties to file replies, and one week for the Court to review all pleadings before the start of the motions hearing). The defense acknowledged that the reply period was not necessary in the Defense Proposed Case Management Order, dated 22 May 12.

g. **Phase 5. Trial by Members (5 October 2012 – 26 October 2012)**

- (1) Voir Dire: 5 October 2012
- (2) Trial: 8 October 2012-26 October 2012



ANGEL M. OVERGAARD  
CPT, JA  
Assistant Trial Counsel

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211 )

Prosecution Disclosure  
to the Defense

30 May 2012

The United States responds to the Court's Order, dated 29 May 2012 as follows:

1. On 18 May 2012, the United States filed an *ex parte* motion requesting the Court consider that motion *in camera* and *ex parte* under MRE 505(g)(2) and to authorize a substitution of the portion of the Defense Intelligence Agency (DIA) Information Review Task Force (IRTF) damage assessment that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2). The United States requested the Court authorize redactions and a summary under MRE 505(g)(2)(A) and (B). See Enclosure 1. The United States seeks to protect information relating to the foreign relations and foreign activities of the United States, all within the national security interests of the United States.

2. On 18 May 2012, the United States filed an *ex parte* motion requesting the Court consider that motion *in camera* and *ex parte* under MRE 505(g)(2) and to authorize a substitution of the portion of the Central Intelligence Agency (CIA) report that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2). The United States requested the Court authorize a summary under MRE 505(g)(2)(B). See Enclosure 2. The United States seeks to protect information relating to intelligence activities, intelligence sources or methods, and foreign relations or foreign activities of the United States, all within the national security interests of the United States.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

2 Enclosures

1. Government *ex parte* Motion (DIA) [unclassified redacted version]
2. Government *ex parte* Motion (CIA) [unclassified redacted version]



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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

### Prosecution Disclosure to the Defense

**Enclosure 1**

30 May 2012

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

Government *in camera* Motion for  
Authorization of a Substitution of  
the DIA (IRTF) Damage Assessment  
under MRE 505(g)(2)

18 May 2012

### RELIEF SOUGHT

(U) COMES NOW the United States of America, by and through undersigned counsel, respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2); and (2) authorize a substitution of the portion of the Defense Intelligence Agency (DIA) Information Review Task Force (IRTF) damage assessment that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).

### BURDEN OF PERSUASION AND BURDEN OF PROOF

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. Rule for Courts Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

### FACTS

(U) On 23 March 2012, the Court ordered (hereinafter "Court's Order") the prosecution to identify what classified information from the DIA damage assessment is favorable to the accused and material to guilt or punishment.

(U) On 23 March 2012, the Court ordered the prosecution to disclose all classified information from the DIA damage assessment to the Court for *in camera* review under 701(g)(2) or, at the request of the prosecution, *in camera* review for limited disclosure under MRE 505(g)(2).

(U) On 23 March 2012, the Court ordered the prosecution to move for an *in camera* proceeding under MRE 505(i)(2) and (3) and provide notice to the defense under MRE 505(i)(4)(A), if the Department of Defense claims a privilege under MRE 505(c) for the damage assessment.

(U) According to the IRTF Final Report, the following summarizes the purpose and overall approach of the DIA task force.

(U) At the direction of the U.S. Secretary of Defense (SecDef), the Information Review Task Force (IRTF) assessed the impact of unauthorized WikiLeaks disclosure of United States Government (USG) records. The IRTF completed a comprehensive review of

[REDACTED]

more than 740,000 records known or believed compromised to WikiLeaks, coordinated its review throughout the Intelligence Community (IC), and integrated its efforts with those of the National Counterintelligence Executive (NCIX).

(U) Given the enormity of the challenge, the IRTF reached out and received tremendous support from not only the affected Department of Defense (DoD) Components but also from the multiple affected federal departments and agencies as well. This whole of-government approach, together with close coordination with the appropriate legal and foreign disclosure officials, enabled the IRTF to get ahead of the WikiLeaks public releases and to inform senior leaders and policymakers across the USG as well as coalition governments prior to public disclosure so that mitigation actions could be taken.

Enclosure 1.

(U) The original damage assessment is classified:

"SECRET//NOFORN".

(U) The proposed summarized damage assessment with redactions is classified:

"SECRET//NOFORN".

(U) Although the IRTF damage assessment was ordered at the direction the Secretary of Defense, the DIA, a military intelligence agency, conducted the assessment. The IRTF Final Report contains information from other military organizations and from federal organizations outside military authorities. DIA identified the following equity holders within the Final Report:

[REDACTED]

(U) [REDACTED] reviewed the Final Report and do not object to their information, contained within the Final Report, being made available to the defense.

[REDACTED]

(U) [REDACTED] approved the release of their information contained within the Final Report; however, they requested some portions to be redacted. See Enclosure 5.

## WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider enclosures listed at the end of this motion.

## LEGAL AUTHORITY AND ARGUMENT

(U) If classified information is at issue in a court martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

( ) The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the DIA, ( ), through the prosecution, are voluntarily disclosing a summary of the damage assessment, pursuant to the Court's Order and are not withholding any classified information under MRE 505(c) and MRE 505(i).

(U) Pursuant to the Court's Order, the prosecution reviewed the original IRTF damage assessment for information favorable to the accused and material to guilt or punishment. See RCM 701(a)(6); see also Brady v. Maryland, 373 U.S. 83 (1963). The prosecution also reviewed for information material to the preparation of the defense because DIA is an intelligence agency within the Department of Defense. See RCM 701(a)(2). The prosecution reviewed the original IRTF damage assessment and determined that it contained information that was material to the preparation of the defense, favorable to the accused, and material to guilt or punishment. The prosecution identified discoverable information, and DIA reviewed the information to determine if it would authorize the prosecution to voluntarily disclose the original classified material to the defense under MRE 505(g)(1) or (g)(2). The appropriate Original Classification Authority determined that DIA would disclose the entire Final Report in the original form under MRE 505(g)(1), but subject to the approvals of other equity holders of the information contained within the report.

( ) DIA identified the following equity holders within the Final Report: ( )

( ) reviewed the Final Report and do not object to

[REDACTED]

their information, contained within the Final Report, being made available to the defense under MRE 505(g)(1). The [REDACTED] requested certain information be redacted or summarized and a summary be produced under MRE 505(g)(2). Outlined below are [REDACTED] requests and the prosecution's procedures taken pursuant to the Court's Order and under MRE 505(g)(2) to provide discoverable information from within the IRTF Final report to the defense.

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] approved the release of their information contained within the Final Report; however, they requested some portions to be redacted. See Enclosure 5. After review of the redactions, the prosecution identified one redaction (hereinafter "discoverable redaction") which contains information that **does meet** the RCM 701(a)(6) or Brady/Giglio standards and therefore is discoverable. On page [REDACTED] of the Final Report, the IRTF assessed [REDACTED]

[REDACTED] See Enclosure 1. [REDACTED] determined that the agency would disclose the discoverable redaction in a summarized form under MRE 505(g)(2). The prosecution reviewed the summary and determined that it accurately summarized the original material, including providing adequate context.

(U) The remaining redacted information contained within the original damage assessment, **does not meet** the RCM 701(a)(6) or Brady/Giglio standards and therefore is not discoverable. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the remaining redacted information.

\_\_\_\_\_

(U) The United States respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize a substitution of the portion of the DIA (IRTF) damage assessment that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).

ASHDEN FEIN  
MAJ, JA  
Trial Counsel

1. Original DIA Damage Assessment (classified "SECRET//NOFORN")
2. Redacted and Summarized DIA Damage Assessment (classified "SECRET//NOFORN")
3. Draft Sealing Orders (x2)
4. [REDACTED]
5. [REDACTED], dated 18 May 2012 (classified "[REDACTED]")

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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

### Prosecution Disclosure to the Defense

**Enclosure 2**

**30 May 2012**

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211 )

Government *in camera* Motion for  
Authorization of a Substitution of  
the CIA Damage Assessment  
under MRE 505(g)(2)

18 May 2012

### RELIEF SOUGHT

(U) COMES NOW the United States of America, by and through undersigned counsel, respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2); and (2) authorize a substitution of the portion of the Central Intelligence Agency (CIA) damage assessment (hereinafter "report") that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).

### BURDEN OF PERSUASION AND BURDEN OF PROOF

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. Rule for Courts-Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

### FACTS

(U) On 23 March 2012, the Court ordered (hereinafter "Court's Order") the prosecution to identify what classified information from the CIA WikiLeaks Task Force report is favorable to the accused and material to guilt or punishment.

(U) On 23 March 2012, the Court ordered the prosecution to disclose all classified information from the CIA report to the Court for *in camera* review under 701(g)(2) or, at the request of the prosecution, *in camera* review for limited disclosure under MRE 505(g)(2).

(U) On 23 March 2012, the Court ordered the prosecution to move for an *in camera* proceeding under MRE 505(i)(2) and (3) and provide notice to the defense under MRE 505(i)(4)(A), if the CIA claims a privilege under MRE 505(c) for the report.

( ) The CIA organized a WikiLeaks Task Force (WTF) concerning the damage to CIA equities from the compromise of the . The WTF produced a report that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security. See Enclosure 1. The original report is classified . The proposed summarized report is classified .

( ) Based on the classification and the use of in the original report, the CIA will accommodate the Court in its review of the enclosures, to include making the CIA, Headquarters available or using .



[REDACTED] Mr. [REDACTED] is the point of contact within the Litigation Division, Office of the General Counsel, and will coordinate the original report and the proposed summarized assessment being available anytime the Court would like to review the material and the mutually agreeable location.

[REDACTED] Mr. [REDACTED] may be contacted at [REDACTED] or [REDACTED].

( ) The CIA acknowledged that the original report and the proposed summarized report must be made part of the appellate record. Accordingly and because the documents contain [REDACTED], the CIA requests the documents be permanently stored at CIA Headquarters.

(U) The CIA gives temporary custody of the summarized report to the prosecution. The prosecution is authorized to make the report available to the defense counsel and their security experts to inspect until the end of the court-martial. The defense counsel are only authorized access to inspect the summarized report with their security experts present. The defense counsel and their experts are authorized to take notes, and those notes will be classified at the same level as the report. All notes must be stored pursuant to the Court's Protective Order, dated 16 March 2012. The defense counsel and their experts are not authorized to share the information contained within the report or their notes with the accused. At the conclusion of the court martial, the prosecution is required to return all the copies of the summarized report to the CIA.

#### WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider enclosures listed at the end of this motion.

#### LEGAL AUTHORITY AND ARGUMENT

(U) If classified information is at issue in a court-martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

(U) The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the CIA, through the prosecution is voluntarily disclosing a summary of their report, pursuant to the Court's Order and is not withholding any classified information under MRE 505(c) and MRE 505(i).

[REDACTED]

[REDACTED] Pursuant to the Court's Order, the prosecution traveled to CIA headquarters and reviewed the original [REDACTED] report for information favorable to the accused and material to guilt or punishment. See RCM 701(a)(6); see also *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution reviewed the original CIA report and determined that it contained information that was favorable to the accused and material to guilt or punishment. The particular sections are highlighted in yellow. See Enclosure 1. The prosecution identified discoverable information and the CIA reviewed the information to determine if it would authorize the prosecution to voluntarily disclose the original classified material to the defense under MRE 505(g)(1) or (g)(2). The CIA determined that the agency would disclose the information in a summarized form under MRE 505(g)(2). The prosecution reviewed the summary and determined that it accurately summarized the original material, including providing adequate context.

(U) The information contained within the original report, which is not included in the summary, does not meet the RCM 701(a)(6) or *Brady/Giglio* standards and therefore is not discoverable. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the non summarized information.

(U) Should the Court find the deleted, substituted, or summarized information is discoverable under RCM 701(a)(6), or *Brady/Giglio*, or is "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the United States requests the opportunity to either- (1) address the Court's findings with the relevant government agency to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the United States to move for an *in camera* proceeding under MRE 505(i).

[REDACTED]

[REDACTED] If the prosecution does offer aggravating evidence during the presentencing portion of the trial, then it will disclose the evidence pursuant to RCM 701(a)(5), subject to any required protections under MRE 505.

### CONCLUSION

(U) The United States respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize a substitution of the portion of the CIA report that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).



ASHDEN FEIN  
MAJ. JA  
Trial Counsel

3 Enclosures

1. Original CIA Report (classified [REDACTED] [REDACTED]) [not attached]
2. Summarized CIA Report (classified [REDACTED]) [not attached]
3. Draft Sealing Orders (x3)

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Disclosure  
to the Defense  
Supplement

31 May 2012

The United States supplements its Disclosure to the Defense, dated 30 May 2012, with the enclosed less redacted copy of the DIA *ex-parte* filing. See Enclosure. The explanation of the national security interests the Government seeks to protect with the limited disclosure has not changed.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

Enclosure

Government *Ex-Parte* Motion (DIA) [unclassified redacted version 2]

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 31 May 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

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**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

### Prosecution Disclosure to the Defense Supplement

**Enclosure**

31 May 2012

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

Government *in camera* Motion for  
Authorization of a Substitution of  
the DIA (IRTF) Damage Assessment  
under MRE 505(g)(2)

18 May 2012

**RELIEF SOUGHT**

(U) COMES NOW the United States of America, by and through undersigned counsel, respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2); and (2) authorize a substitution of the portion of the Defense Intelligence Agency (DIA) Information Review Task Force (IRTF) damage assessment that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

(U) As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. Rule for Courts Martial (RCM) 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

**FACTS**

(U) On 23 March 2012, the Court ordered (hereinafter "Court's Order") the prosecution to identify what classified information from the DIA damage assessment is favorable to the accused and material to guilt or punishment.

(U) On 23 March 2012, the Court ordered the prosecution to disclose all classified information from the DIA damage assessment to the Court for *in camera* review under 701(g)(2) or, at the request of the prosecution, *in camera* review for limited disclosure under MRE 505(g)(2).

(U) On 23 March 2012, the Court ordered the prosecution to move for an *in camera* proceeding under MRE 505(i)(2) and (3) and provide notice to the defense under MRE 505(i)(4)(A), if the Department of Defense claims a privilege under MRE 505(c) for the damage assessment.

(U) According to the IRTF Final Report, the following summarizes the purpose and overall approach of the DIA task force.

(U) At the direction of the U.S. Secretary of Defense (SecDef), the Information Review Task Force (IRTF) assessed the impact of unauthorized WikiLeaks disclosure of United States Government (USG) records. The IRTF completed a comprehensive review of

[REDACTED]

more than 740,000 records known or believed compromised to WikiLeaks, coordinated its review throughout the Intelligence Community (IC), and integrated its efforts with those of the National Counterintelligence Executive (NCIX).

(U) Given the enormity of the challenge, the IRTF reached out and received tremendous support from not only the affected Department of Defense (DoD) Components but also from the multiple affected federal departments and agencies as well. This whole-of-government approach, together with close coordination with the appropriate legal and foreign disclosure officials, enabled the IRTF to get ahead of the WikiLeaks public releases and to inform senior leaders and policymakers across the USG as well as coalition governments prior to public disclosure so that mitigation actions could be taken.

Enclosure 1.

(U) The original damage assessment is classified:

"SECRET//NOFORN".

(U) The proposed summarized damage assessment with redactions is classified:

"SECRET//NOFORN".

( ) Although the IRTF damage assessment was ordered at the direction the Secretary of Defense, the DIA, a military intelligence agency, conducted the assessment. The IRTF Final Report contains information from other military organizations and from federal organizations outside military authorities. DIA identified the following equity holders within the Final Report:

[REDACTED]

( ) [REDACTED] reviewed the Final Report and do not object to their information, contained within the Final Report, being made available to the defense.

( ) [REDACTED] approved the release of their information contained within the Final Report, however, requested [REDACTED] on page [REDACTED] of the Final Report to be redacted. See Enclosure 4.

( ) [REDACTED] approved the release of their information contained within the Final Report; however, they requested some portions to be redacted. See Enclosure 5.

## WITNESSES/EVIDENCE

(U) The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider enclosures listed at the end of this motion.

## LEGAL AUTHORITY AND ARGUMENT

(U) If classified information is at issue in a court martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

( ) The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the DIA, ( ), through the prosecution, are voluntarily disclosing a summary of the damage assessment, pursuant to the Court's Order and are not withholding any classified information under MRE 505(c) and MRE 505(i).

(U) Pursuant to the Court's Order, the prosecution reviewed the original IRTF damage assessment for information favorable to the accused and material to guilt or punishment. See RCM 701(a)(6); see also Brady v. Maryland, 373 U.S. 83 (1963). The prosecution also reviewed for information material to the preparation of the defense because DIA is an intelligence agency within the Department of Defense. See RCM 701(a)(2). The prosecution reviewed the original IRTF damage assessment and determined that it contained information that was material to the preparation of the defense, favorable to the accused, and material to guilt or punishment. The prosecution identified discoverable information, and DIA reviewed the information to determine if it would authorize the prosecution to voluntarily disclose the original classified material to the defense under MRE 505(g)(1) or (g)(2). The appropriate Original Classification Authority determined that DIA would disclose the entire Final Report in the original form under MRE 505(g)(1), but subject to the approvals of other equity holders of the information contained within the report.

( ) DIA identified the following equity holders within the Final Report: ( ) ( ) reviewed the Final Report and do not object to

[REDACTED]

their information, contained within the Final Report, being made available to the defense under MRE 505(g)(1). The [REDACTED] requested certain information be redacted or summarized and a summary be produced under MRE 505(g)(2). Outlined below are [REDACTED] requests and the prosecution's procedures taken pursuant to the Court's Order and under MRE 505(g)(2) to provide discoverable information from within the IRTF Final report to the defense.

[REDACTED]

[REDACTED] approved the release of their information contained within the Final Report, however, requested [REDACTED] on page [REDACTED] of the Final Report to be redacted. See Enclosure 4. This redacted information contained within the original damage assessment, does not meet the RCM 701(a)(2), RCM 701(a)(6), or Brady/Giglio standards and therefore is not discoverable. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the redacted information.

[REDACTED] Should the Court find the redacted information is discoverable under RCM 701(a)(2), RCM 701(a)(6), or Brady/Giglio, or is "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the United States requests the opportunity to either- (1) address the Court's findings with [REDACTED] to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for [REDACTED] to claim a privilege under MRE 505(c) and the United States to move for an *in camera* proceeding under MRE 505(i).

[REDACTED]

[REDACTED] approved the release of their information contained within the Final Report; however, they requested some portions to be redacted. See Enclosure 5. After review of the redactions, the prosecution identified one redaction (hereinafter "discoverable redaction") which contains information that does meet the RCM 701(a)(6) or Brady/Giglio standards and therefore is discoverable. On page [REDACTED] of the Final Report, the IRTF assessed [REDACTED]

[REDACTED] See Enclosure 1. [REDACTED] determined that the agency would disclose the discoverable redaction in a summarized form under MRE 505(g)(2). The prosecution reviewed the summary and determined that it accurately summarized the original material, including providing adequate context.

(U) The remaining redacted information contained within the original damage assessment, does not meet the RCM 701(a)(6) or Brady/Giglio standards and therefore is not discoverable. Additionally, that information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the remaining redacted information.



If the prosecution does offer aggravating evidence during the presentencing portion of the trial, then it will disclose the evidence pursuant to RCM 701(a)(5), subject to any required protections under MRE 505.

(U) The United States respectfully requests this Court to: (1) consider this motion *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize a substitution of the portion of the DIA (IRTF) damage assessment that is favorable to the accused and material to guilt or punishment under MRE 505(g)(2).

ASHDEN FEIN  
MAJ, JA  
Trial Counsel

1. Original DIA Damage Assessment (classified "SECRET//NOFORN")
2. Redacted and Summarized DIA Damage Assessment (classified "SECRET//NOFORN")
3. Draft Sealing Orders (x2)
4. [REDACTED], dated 8 May 2012 (classified "[REDACTED]")
5. [REDACTED], dated 18 May 2012 (classified "[REDACTED]")

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

**MANNING, Bradley E., PFC**

U.S. Army, xxx-xx-[REDACTED]

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE RESPONSE TO  
GOVERNMENT MOTIONS FOR  
AUTHORIZATION OF A  
SUBSTITUTION**

1 June 2012

RELIEF REQUESTED

1. The Defense requests that the Court:

- a) Find that both the Defense Intelligence Agency (DIA) Information Review Task Force (IRTF) and the Central Intelligence Agency (CIA) WikiLeaks Task Force (WTF) damage assessments are material to the preparation of the defense and Order that they be produced to the Defense; and
- b) Deny any proposed substitutions where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial.

EVIDENCE

2. The Defense does not request any witnesses for this motion, but does request that the Court consider Appellate Exhibit IX for the purposes of this motion.

FACTS

3. The DIA and CIA have not claimed a privilege under MRE 505(c). Therefore, the damage assessments being considered by the Court are governed by *Brady*/R.C.M. 701(a)(6), R.C.M. 701(a)(2), and M.R.E. 505(g).

4. The Government concedes that documents within the possession of DIA, the organization that prepared the IRTF, are governed by R.C.M. 701(a)(2). *See* Government In Camera Motion for

Authorization of a Substitution of the DIA (IRTF) Damage Assessment under MRE 505(g)(2) at p. 3 (“The prosecution reviewed the original IRTF damage assessment and determined that it contained information that was material to the preparation of the defense.).

5. The WTF damage assessment was prepared by the CIA. The Court has found that the CIA is “closely aligned” with the Government in this case. Accordingly, for the reasons outlined in previous Defense motions, this material is discoverable under R.C.M. 701(a)(2).

6. In the Court’s 23 March 2012 ruling, the Court ruled that it would review the IRTF and WTF damage assessments under R.C.M. 701(a)(2) and R.C.M. 701(a)(6). The Court stated:

The Court finds all 3 damage assessments relevant and necessary for the Court to conduct an *in camera* review to determine whether they contain information that is favorable to the accused and material to punishment under *Brady*, whether they contain information relevant and favorable to the accused under RCM 701(a)(6), and whether they contain information material to the preparation of the defense under RCM 701(a)(2).

Appellate Exhibit XXXVI, p. 11.

## ARGUMENT

### **A. The *In Camera* Standard**

7. From reading the Government’s non-*ex parte* filing, it seems that the Government is:

a) Asking the Court to review the IRTF damage assessment under R.C.M. 701(a)(2) (“material to the preparation of the defense”) standard and the R.C.M. 701(a)(6)/*Brady* standard. However, it appears that the Government believes that only portions of the damage assessment, rather than the entire damage assessment, are discoverable under R.C.M. 701(a)(2).

b) Asking the Court to review the WTF damage assessment *only* under the R.C.M. 701(a)(6)/*Brady* standard. The Defense believes this to be the case based on the Government’s statement that “the information contained within the original report, which is not included in the summary, does not meet the RCM 701(a)(6) or *Brady/Giglio* standard and therefore is not discoverable.” Government In Camera Motion for Authorization of a Substitution of the CIA Damage Assessment under MRE 505(g)(2), p. 3.

Thus, there are two issues here: (1) what standard the Court will apply in reviewing the two damage assessments; and (2) whether R.C.M. 701(a)(2) contemplates only portions of the document, rather than the document itself, being material to the preparation of the defense. Each will be discussed in turn.

8. The Court has already ruled that it will be reviewing the two damage assessments to determine “whether they contain information relevant and favorable to the accused under RCM 701(a)(6), and *whether they contain information material to the preparation of the defense under*

RCM 701(a)(2).” Appellate Exhibit XXXVI. The Government is attempting to surreptitiously re-litigate the standard under which the Court has already said it would use to review the damage assessments. Accordingly, the Court should reject this attempt to circumvent the Court’s ruling and review the documents in accordance with its original order.

9. The case law reaffirms that “material” under R.C.M. 701(a)(2)(A) is not a difficult standard to satisfy. In *United States v. Cano*, 2004 WL 5863050 at \*3 (A. Crim. Ct. App. 2004), our superior court discussed the content of the “materiality” standard under R.C.M. 701(a)(2)(A):

In reviewing AE V in camera, the military judge said that he examined the records and AE III contained “everything . . . [he] thought was even remotely potentially helpful to the defense.” That would be a fair trial standard, but our examination finds a great deal more that should have been disclosed as “material to the preparation of the defense.” We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.

See also *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (“The defense had a right to this information because it was relevant to SA M’s credibility and was therefore material to the preparation of the defense for purposes of the Government’s obligation to disclose under R.C.M. 701(a)(2)(A).”(emphasis added); *United States v. Adens*, 56 M.J. 724, 733 (A.C.C.A. 2002)(“We respectfully disagree with our sister court’s narrow interpretation that the term ‘material to the preparation of the defense’ in R.C.M. 701(a)(2)(A) and (B) is limited to exculpatory evidence under the *Brady* line of cases and hold that our sister court’s decision in *Trimper* should no longer be followed in Army courts-martial. There is no language in R.C.M. 701, or in its analysis, indicating any intent by the President to limit disclosure under Article 46, UCMJ, to constitutionally required exculpatory matters. As noted above, R.C.M. 701 is specifically intended to provide ‘for broader discovery than is required in Federal practice’ (R.C.M. 701 Analysis, at A21–32), and unquestionably is intended to implement an independent statutory right to discovery under Article 46, UCMJ.”); *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008) (“[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are ‘material to the preparation of the defense.’ R.C.M. 701(a)(2)(A). Thus, an accused’s right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.”).

10. So, the first step in the Court’s analysis must be whether the IRTF and WTF damage assessments contain *Brady* and whether they are material to the preparation of the defense – as in “helpful” to the preparation of the defense. To reiterate, the Court has already ruled that the WTF damage assessment would be reviewed under the R.C.M. 701(a)(2) standard, not just the R.C.M. 701(a)(6) standard.

11. It appears that the Government may be trying to argue that only *portions* of the IRTF damage assessment are material to the preparation of the defense, as opposed to the entire

document. *See e.g.* Government In Camera Motion for Authorization of a Substitution of the DIA (IRTF) Damage Assessment under MRE 505(g)(2), p. 4 (“This redacted information contained within the original damage assessment does not meet the ... RCM 701(a)(2) [standard]”). R.C.M. 701(a)(2) does not contemplate that the defense can examine *portions* of documents that are material to the preparation of the defense. Rather, R.C.M. 701(a)(2) provides that:

After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

Thus, the rule provides for defense counsel to inspect “documents ... which are material to the preparation of the defense.” *Id.* The materiality inquiry looks at the document at a whole and not simply portions of it.

## **B. The Proposed Substitutions**

12. Once the Court has determined that the damage assessments contain *Brady* and/or are material to the preparation to the Defense under R.C.M 701(a)(2), then the Court must examine the proposed substitutions with a view to determining whether the classified information is itself necessary to enable the accused to prepare for trial. *United States v. Lonctree*, 31 M.J. 849 (N-M-C.M.R. 1990), *aff’d* 35 M.J. 396 (C.M.A. 1992).

13. Limited disclosure and substitutes under MRE 505(g)(2) include:

- a) Deletion of specific items of classified information from documents to be made available to an accused;
- b) Substitution of a portion or summary of the information for such documents;
- c) Substitution of a statement admitting relevant facts;

All of these are permitted unless the judge determines that the classified information itself is necessary to enable the accused to prepare for trial. *See* M.R.E. 505(g)(2).<sup>1</sup>

<sup>1</sup> MRE 505(g)(2) provides as follows: “Limited disclosure. The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government’s motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.”

14. Thus, the Government is authorized under M.R.E. 505(g)(2) to substitute a summary of the information contained in a classified document rather than the classified document. The rule itself recognizes, however, that the Court may recognize that "disclosure of the classified information itself is necessary to enable the accused to prepare for trial." This deference to the accused's rights even after a claim of privilege by the government is well-settled. *See United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998)(holding that a trial court considering substitutions "...should, of course, err on the side of protecting the interests of the defendant").

15. The Defense is obviously at a huge disadvantage as it does not know the nature or extent of the proposed substitutions. However, in making the determination as to whether the classified information is "necessary to enable the accused to prepare for trial," the Defense submits that the Court should use a standard akin to the R.C.M. 701(a)(2) standard. That is, information that would be helpful to the defense under R.C.M. 701(a)(2) is "necessary to enable the accused to prepare for trial." *See also* cases cited *supra*.

16. In making the determination of whether the classified evidence is necessary or whether a redaction/substitution is appropriate, the Defense would ask that the Court look at the following:

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?
- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government's very broad reading of many of these offenses?
- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? If so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?

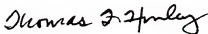
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

#### CONCLUSION

17. Accordingly, the Defense requests that this Court not accept the Government's proposed substitutions at face value, but rather ask searching questions about whether the original classified information is necessary to enable the accused to prepare for trial. In addition, the Defense requests that the Court:

- a) Find that both the IRTF and WTF damage assessments are material to the preparation of the defense and Order that they be produced to the Defense; and
- b) Deny any proposed substitutions where, considering the mindset of Defense counsel (including the questions referenced herein), the Court concludes that the classified information itself is necessary to enable the accused to prepare for trial.

Respectfully submitted,



THOMAS F. HURLEY  
MAJ, JA  
Defense Counsel



DAVID E. COOMBS  
Civilian Defense Counsel

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Request  
for Additional Time to Supplement  
Court Order to Provide Unclassified and  
Redacted Version of Government  
*Ex-Parte* Filing

30 May 2012

1. The United States requests additional time to supplement its response to the Court's Order to provide the Court and the defense with an unclassified and redacted version of its Defense Intelligence Agency (DIA) *ex-parte* filing (hereinafter "DIA *ex-parte* filing"), dated 18 May 2012, until 31 May 2012.
2. At 1652 hours on 29 May 2012, the Court ordered, via email, the United States to "provide the Court and the Defense with an unclassified redacted version of its *ex-parte* motion NLT 30 May 2012 that describes the general nature of the proposed substitutions and the national security interest the Government seeks to protect with the substitutions." See Ruling: Defense Motion: Non-Ex Parte Filing by Government, dated 29 May 2012. The United States complied with the Court's Order by contemporaneously filing the Prosecution's Disclosure to the Defense, dated 30 May 2012, along with the unclassified and redacted versions of its *ex-parte* filings.
3. By 1900 hours tonight, the United States obtained approval from all but one federal organization with equity in the DIA damage assessment to release an unclassified and redacted version of the DIA *ex-parte* filing. The United States coordinated to obtain approval from the remaining federal organization with equity in the DIA damage assessment by contacting, throughout the day, three separate attorneys at the organization. The primary and alternate attorneys assigned to handle this case were out of the office for the entire day. In an effort to exhaust all possible resources, the United States contacted a third attorney, who is not assigned to this case and who responded at approximately 1900 hours tonight. This attorney attempted to contact an original classification authority (OCA) to review the Government's proposed redactions of classified information, but no OCA was available to assist.
4. Although the United States has provided the defense an unclassified and redacted version of the DIA *ex-parte* filing, the United States requests one additional duty day to supplement its response to the Court's Order. The United States intends to receive approval from the government organization to provide the defense a less redacted copy of the DIA *ex-parte* filing, as well as a possibly more detailed unclassified explanation of the national security interests the Government seeks to protect with the limited disclosure. This request will not necessitate any delay in the proceedings and will potentially disclose even more information to the defense; as such, there will be no prejudice to the defense.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel



I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 30 May 2012.

A handwritten signature in black ink, appearing to be 'Ashden Fein', with a stylized, flowing script.

ASHDEN FEIN  
MAJ, JA  
Trial Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC  
U.S. Army, xxx-xx-  
Headquarters and Headquarters Company, U.S.  
Army Garrison, Joint Base Myer-Henderson Hall,  
Fort Myer, VA 22211

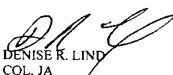
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)  
) **RULING: GOVERNMENT:**  
) **MOTION FOR**  
) **CONTINUANCE**

) 31 May 2012  
)

On 30 May 2012, the Government requested a continuance from 30 May 12 to 31 May 12 to provide the Court and the Defense with an unclassified and redacted version of the Government's *ex parte* Defense Intelligence Agency (DIA) filing. The reasons for the request are set forth in the Government motion. The Government has otherwise complied with the Court's order. Defense has not objected.

**RULING:** The Government motion for a continuance until 31 May 2012 is **GRANTED**.

**ORDERED:** This 31st day of May 2012.

  
DENISE R. LIND  
COL, JA  
Chief Judge, 1<sup>st</sup> Judicial Circuit

UNITED STATES OF AMERICA )

v. )

Manning, Bradley E. )  
PFC, U.S. Army, )  
HHC, U.S. Army Garrison, )  
Joint Base Myer-Henderson Hall )  
Fort Myer, Virginia 22211 )

**Prosecution Notice to Court of  
Identification of  
NCIX Damage Assessment**

**31 May 2012**

**NOTICE**

The prosecution hereby provides notice to the Court that the United States believes the Court's Ruling: Defense Motion to Compel Discovery, dated 23 March 2012, (Appellate Exhibit XXXVI) should apply to the Office of the National Counterintelligence Executive (NCIX) draft damage assessment. The prosecution's belief is based on information the prosecution learned at a meeting with attorneys from the Office of the Director of National Intelligence (ODNI) on 17 May 2012.<sup>1</sup>

During the March 2012 motions hearing and based on previously received input from NCIX, the prosecution stated that NCIX had not completed a damage assessment. Draft Transcript at 167 ("[NCIX has] not completed the damage assessments."). In response to subsequent inquiries from the Court in March 2012, the prosecution stated, based on input from NCIX, that NCIX "has not produced any interim or final damage assessments in this matter." See Appellate Exhibit XXXVI at 6. On 11 May 2012, the Court held the Department of State's (DoS) draft damage assessment was subject to the Court's previous ruling. See Appellate Exhibit LXXXVI. In response, the prosecution shared that ruling with ODNI and subsequently met with their attorneys on 17 May 2012 to discuss the issue of draft documents. During that meeting, ODNI notified the prosecution that NCIX had compiled a draft damage assessment, which is likely similar in form to the DoS assessment, and thus would fall under the Court's ruling on 11 May 2012. ODNI also stated that it hoped to produce a final damage assessment by the end of Summer 2012.

Based on this information and in the interest of justice, the prosecution believes the Court's ruling regarding the DoS draft damage assessment should also apply to the NCIX draft damage assessment. Upon reaching that conclusion, the prosecution took immediate action to remedy the discrepancy between the NCIX draft damage assessment and the DoS draft damage assessment. On 24 May 2012, the prosecution officially notified ODNI that the NCIX draft damage assessment must be made available to the Court no later than 3 August 2012 and requested access to the NCIX draft damage assessment to conduct a review for discoverable information.<sup>2</sup> See Enclosure 1. On 30 May 2012, ODNI responded, granting access to the

<sup>1</sup> The NCIX is a subordinate organization to ODNI. See Office of the National Counterintelligence Executive, About Us, available at <https://www.ncix.gov/about.php> (last visited 22 May 2012). For matters concerning ONCIX, the prosecution is required to coordinate through the ODNI General Counsel's Office.

<sup>2</sup> 3 August 2012 is the suspense date set by the Court's Scheduling Order, dated 25 April 2012, as the next date either to produce compelled discovery or file compelled discovery with the Court IAW MRE 505.

prosecution for the purposes of conducting a review and stating that the most recent draft damage assessment would be provided to the Court by the 3 August 2012 suspense date. See Enclosure 2.

In accordance with its 24 May 2012 letter, the prosecution intends to review the NCIX draft damage assessment for discoverable information and ensure the most recent draft, or final copy, is made available to disclose to the Court no later than 3 August 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

2 Enclosures

1. Letter by MAJ Fein, dated 24 May 2012
2. Letter by ODNI, dated 30 May 2012

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel via electronic mail, on 31 May 2012.



ASHDEN FEIN  
MAJ, JA  
Trial Counsel

) ) ) ) ) ) ) ) ) )

**Y.**

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**Enclosure 1**

31 May 2012



REPLY TO  
ATTENTION OF

**FOR OFFICIAL USE ONLY**

**DEPARTMENT OF THE ARMY**  
**U.S. ARMY MILITARY DISTRICT OF WASHINGTON**  
**210 A STREET**  
**FORT LESLEY J. MCNAIR, DC 20319-5013**

May 24, 2012

Criminal Law Division, Office of the Staff Judge Advocate

Ms. Tricia S. Wellman  
Deputy General Counsel  
Office of the Director of National Intelligence  
Washington, DC 20511

Re: United States v. Private First Class (PFC) Bradley E. Manning

Dear Ms. Wellman:

The U.S. Army prosecution ("prosecution") is currently in the discovery phase of the court-martial of Private First Class (PFC) Bradley Manning for his charged acts involving WikiLeaks. Accordingly, the prosecution respectfully requests access to the most recent version of the Office of the National Counterintelligence Executive's (NCIX) draft damage assessment in order to review the material for any discoverable information.

During the March 2012 motions hearing and in subsequent emails to the Court, based on the input received from NCIX, the prosecution proffered to the Court that NCIX had not completed a damage assessment, and had not produced any interim or final damage assessment. At that time the prosecution also proffered to the Court that the Department of State has not completed a damage assessment. On March 23, 2012, the Court ruled that the Department of State's draft damage assessment was discoverable, and did not rule on NCIX's draft. See enclosed discovery order. Subsequently, the prosecution argued that drafts are speculative by their very nature, and accordingly should not be subject to discovery rules. On May 11, 2012, the Court held the Department of State's draft damage assessment was subject to her previous ruling and the prosecution was required to review the draft for "information that is favorable to [PFC Manning] and material to guilt or punishment." See enclosed ruling.

Based on the Court's ruling, the previous discovery order, and applicable ethical obligations, the prosecution believes it must review NCIX's draft damage assessment to determine whether there is any discoverable information, that is information which could impact PFC Manning's rights under the U.S. Constitution, Article 46 of the Uniform Code of Military Justice, the Rules for Courts-Martial, and applicable case law, in the draft. Additionally, the prosecution must notify the Court of the above described apparent inconsistency in the Court's order.

Based on the prosecution's review of other agencies' damage assessments, the prosecution anticipates that if discoverable information is found, that a portion of the discoverable information will require protection from disclosure for reasons of national security. Such protection could be achieved either by disclosing the information to the defense in an alternative form, or through the invocation of the classified information privilege, and the prosecution will work with NCIX to develop any appropriate and necessary alternative

**FOR OFFICIAL USE ONLY**

disclosures. In order to ensure PFC Manning obtains a speedy trial, the prosecution requests that NCIX make the most recent draft available for review by the prosecution as soon as possible and that NCIX have the most current draft available to disclose to the Court no later than August 3, 2012, the date scheduled for other classified disclosures.

As always, the information and requirements stated above are subject to change based on future Court rulings and orders. The prosecution will keep NCIX informed of their status.

Sincerely,

A handwritten signature in black ink, appearing to be 'Ashden Fein', written in a cursive style.

Ashden Fein  
Major, U.S. Army  
Trial Counsel

Enclosures

) ) ) ) ) ) ) ) ) )

**v.**

**Manning, Bradley E.**  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

**Prosecution Notice to Court of  
Identification of  
NCIX Damage Assessment**

**Enclosure 2**

31 May 2012



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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, DC 20511

May 30, 2012

MAJ Ashden Fein  
Trial Counsel  
Department of the Army  
U.S. Army Military District of Washington  
210 A Street  
Fort Lesley J. McNair, DC 20319-5013

Re: United States v. Private First Class (PFC) Bradley E. Manning

Dear Major Fein:

I have received your May 24, 2012 letter in which you request to review the most recent version of the Office of the National Counterintelligence Executive (ONCIX) draft damage assessment related to the disclosure of U.S. Government information to the WikiLeaks organization to determine whether it contains information discoverable in connection with the above-captioned case. The Office of the Director of National Intelligence and the ONCIX approve your request to review the draft assessment, subject to the timing issues discussed further below. In addition, we will provide either a final version of the assessment, or the most current draft available if the document has not been finalized, to the Court by the August 3, 2012 deadline you have identified.

The Counterintelligence Enhancement Act of 2002 (50 USC 402c) provides that the ONCIX, as directed by the DNI and in coordination with appropriate elements of the department and agencies of the United States Government, will oversee and coordinate the production of a government-wide damage assessment in cases where there has been an unauthorized disclosure of classified information. A draft damage assessment related to the disclosure of U.S. Government information to the Wikileaks organization has now been compiled but is, as you know, in a very fluid state. Standard procedure at this stage of the process is to provide the draft to those agencies with equities in the document for review and comment. This process is vital to ensure that the views of all relevant agencies are evaluated by ONCIX and included in the final assessment as appropriate. The current draft could change significantly as a result of the interagency coordination process.

It is our strong preference that your review of the draft take place after the coordination process is completed and comments have been incorporated. This version will be closer in

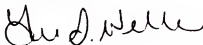
UNCLASSIFIED//FOUO

substance to the final version and will obviate a need to review multiple versions of the document as edits and changes are made. We anticipate that a coordinated version will be available by July 13, 2012 and invite you to review the document on that date. If you determine that the draft document contains discoverable information we will begin the clearance process at that time.

You have also asked that we provide the assessment to the Court no later than August 3, 2012 in order for you to meet your speedy trial obligations. Although we are hopeful that a final assessment will be completed by that time, we will in any event provide the most current version to the court no later than that date. We understand that this presentation to the Court will be ex parte and in camera to protect any classified equities in the assessment.

If you have any questions or would like to discuss the matter further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "Tricia S. Wellman", written in a cursive style.

Tricia S. Wellman  
Deputy General Counsel

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )

v. )

MANNING, Bradley E., PFC )

U.S. Army, xxx-xx- )

Headquarters and Headquarters Company, U.S. )

Army Garrison, Joint Base Myer-Henderson Hall, )

Fort Myer, VA 22211 )

**DEFENSE RESPONSE  
TO PROSECUTION NOTICE  
TO COURT OF ONCIX DAMAGE  
ASSESSMENT**

2 June 2012

RELIEF SOUGHT

1. The Defense requests that this Court order the immediate production of the Office of the National Counterintelligence Executive (ONCIX) damage assessment and all supporting documentation for an *in camera* review by the Court.<sup>1</sup>

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Government has the burden of persuasion. R.C.M. 905(c)(2)(A). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).<sup>2</sup>

EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense requests that this Court consider its own 23 March 2012 Discovery Ruling. Appellate Exhibit XXXVI.

FACTS

4. On 31 May 2012, the Government provided notice to the Court and the Defense that ONCIX had a draft damage assessment. Along with the Government's notice, it provided a copy of its 24 May 2012 letter to ONCIX and the reply by ONCIX on 30 May 2012.

<sup>1</sup> The Defense requested relief is not a waiver of other possible remedies based upon Government discovery violations. The Defense reserves the right to request additional relief from the Court.

<sup>2</sup> The Defense assumes that the Government is moving the Court to allow it until 3 August 2012 to produce the ONCIX damage assessment for *in camera* review.

## ARGUMENT

5. In its Notice, the Government remarkably makes its misrepresentations and lack of diligence look like altruism. See Prosecution Notice to Court of Identification of NCIX Damage Assessment [hereinafter “Government Notice Re: ONCIX Damage Assessment”] at p. 1 (“in the interests of justice, the prosecution believes the Court’s ruling regarding the DoS draft damage assessment should also apply to the ONCIX draft.”). When this Court looks at the timeline of events, it is clear that the “discovery” of the ONCIX damage assessment is just another example – and a particularly egregious one at that – of the Government’s manipulation of the discovery process.

6. The Defense submitted multiple discovery requests for forensic results, investigations and damage assessments from closely aligned agencies, including ONCIX. In the Government Response to the Defense Motion to Compel #1, the Government stated that “ONCIX has not completed a damage assessment.” p. 11. Notably, the Government also said the exact same thing about the Department of State. However, given the information that was available publicly, the Defense was able to show that the Department of State was working on *something*, regardless of whether it was “completed.” Having no knowledge of anything to the contrary with respect to ONCIX, the Defense was forced to accept the Government’s representation that ONCIX did not have anything by way of a damage assessment.

7. On 21 March 2012, the Court required the Government to respond to several factual questions regarding each of the Defense requested damage assessments. The Government responded to the Court’s question regarding the ONCIX damage assessment by stating “ONCIX has not produced any interim or final damage assessment in this matter.” Appellate Exhibit XXXVI at p. 6. The Defense does not believe this was an accurate statement at the time – given that ONCIX is currently in the process of *finalizing* the damage assessment, it stands to reason that ONCIX had some form of interim/draft/working damage assessment as of 21 March 2012. However, having no knowledge at the time of anything to the contrary, the Defense, and now the Court, was forced to accept the Government’s representation.

8. In the Court’s 23 March 2012 ruling, the Court ordered the Government, *inter alia*, to: a) begin the process of producing the Department of State’s damage assessment to the Court for *in camera* review; and b) search ONCIX for forensic results and investigative files.

9. On 23 March 2012, the Government had an obligation to correct its misrepresentation about ONCIX’s damage assessment. Clearly, the Court found that the Department of State damage assessment – even if in interim or draft form – was “relevant and necessary for the Court to conduct an *in camera* review.” Appellate Exhibit XXXVI, p. 11. The Court also ordered the Government to produce the other two damage assessments (the IRTF and WTF damage assessment) at issue. In short, the Court found that damage assessments of closely aligned agencies must be produced to the Court for *in camera* review. This Ruling triggered a duty on the part of the Government to correct the misimpression it had created by its disingenuous use of the expression, “ONCIX has not completed a damage assessment”<sup>3</sup> and what the Defense

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<sup>3</sup> By using the expression “ONCIX has not completed a damage assessment” (when it should have said, “ONCIX has not finished completing its damage assessment”) this implies that such a damage assessment was never even performed.

submits was an outright misrepresentation that ONCIX does not have “any interim or final damage assessment in this matter.” Clearly, as of the 23 March 2012 Ruling, the Court and the Defense believed that ONCIX did not have any sort of damage assessment, final or interim. Since the Government had knowledge to the contrary, there was a duty to disclose that to the Court – not sit on that information for over two months.<sup>4</sup>

10. The Government’s misrepresentations regarding ONCIX continued when it notified the Court on 20 April 2012 that “ONCIX does not have any forensic results or investigative files.” Appellate Exhibit LVI, p. 2. This statement was wholly inconsistent with the few pages of *Brady* discovery the Government had provided a week earlier. In the *Brady* discovery, it was clear that ONCIX was collecting information from various agencies in late 2010 to assess what damage, if any, was occasioned by the leaks. So how could it be that ONCIX neither had an investigation nor a damage assessment?

11. The Defense sent an email on 21 April 2012 to the Court expressing concern about the inconsistency between the Government’s representation that ONCIX did not have a “damage assessment” or “investigative results” and what the Defense was receiving in discovery. The Defense wrote:

Ma’am,

In the Government’s Notification to the Court yesterday, it indicated that the Defense Intelligence Agency (DIA) and the Office of National Counterintelligence Executive (ONCIX) did not have any forensic results or investigative files related to this case.

Approximately a week ago, the Government produced to the Defense approximately 12 pages of *Brady* materials from interim damage assessments from November, 2010 by the Federal Communications Commission, the Federal Trade Commission, the U.S. Department of Urban Development, the Millennium Challenge Corporation, the National Archives, and the United States Marshals Service. [See Attached]. Some of these interim damage assessments reference investigations by ONCIX and DIA. For instance, the 26 November 2010 “Memorandum for the Office of the National Counterintelligence Executive (ONCIX)”, the Federal Communications Commission states, “As requested, this Memorandum provides the response of the Federal Communications Commission (FCC), as requested by the NCIX memo dated 26 October 2010.” (p. 1). Similarly, the 19 November 2010 letter from the U.S. Department of Housing and Urban Development is addressed to the DIA. Moreover, the DIA is overseeing the Information Review Task Force, an investigation into the alleged disclosures. Further, the interim damage assessments also reveal the Office of the Director of

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<sup>4</sup> The duty to disclose does not change simply because the Government was planning on filing a motion for reconsideration of the Court’s ruling. As of 23 March 2012, the Court’s ruling stood – and the Government had an ethical obligation to correct the misimpression it had created. It could not sit on its laurels, then make a feeble attempt at reconsideration, then await a ruling, then reach out to ONCIX and make arrangements, and finally reach out to the Court to inform the Court of the fact that ONCIX did, in fact, have a damage assessment. See AR 27-26, Rule 3.3.

National Intelligence (ODNI) has relevant investigative files. See letter from United States Marshals (“On October 13, 2010, the Office of the Director of National Intelligence (ODNI) ... provided a checklist of questions that it recommended each agency impacted by [WL] dissemination use to assess the impact on its operations.”) The Court’s ruling did not specifically address ODNI; however, previous Defense requests for discovery asked the Government to provide all ODNI investigative files. The Defense will renew its discovery request for ODNI investigative files and forensic results based upon the interim damage assessments.

It is readily apparent that there are investigative files in the hands of the DIA, ONCIX and ODNI. The interim damage assessments clearly show this. Accordingly, the Defense does not understand how the Government can maintain that “DIA does not have any forensic results or investigative files” and “ONCIX does not have any forensic results or investigative files.” The Defense requests that in light of the interim damage assessments, the Government provide a full explanation of its statement that neither of these agencies has investigative files and provide a witness from each of the relevant agencies to appear at a motions hearing.

*See Attachment.*

12. The Government waited until an 802 session to “explain away” the inconsistency. This was when the Government conveniently and out of whole cloth fabricated definitions of “damage assessments” and “investigations.” *See* Appellate Exhibit LXXI. It continued to maintain that ONCIX did not have a damage assessment (even though the Court had already concluded that the Department of State draft/interim assessment was discoverable). And it maintained that the data collected by ONCIX, and presumably accumulated into some report, did not fall within the purview of the word “investigations.” The Defense was stunned by the continued obfuscation. It was abundantly clear that ONCIX had some form of inquiry into the harm from the leaks – but the Government switched definitions around arbitrarily so as to avoid disclosing this discovery to the Defense. The Defense then indicated to the Government that it would submit another discovery request for, *inter alia*, documents from ONCIX. Once again, at this point, the Government should have thought to itself: “We know that ONCIX has responsive documentation, albeit in draft form. Maybe we should tell the Court?” But it didn’t.

13. On 24 April 2012, the Government produced the Department of State damage assessment for *in camera* review and resurrected an issue that the Court had already decided – whether the Department of State damage assessment was discoverable. The Government’s attempt to re-litigate this issue and the authority provided in support of the motion for reconsideration was so weak that the Court did not even want to hear from the Defense in this respect. The Government hung its hat on one sentence of *dicta* from a concurring opinion in a case from 1963. On 11 May 2012, the Court denied the Government’s motion.

14. One would think that at the very least, the Government would choose to inform the Court of the ONCIX damage assessment after the Court’s Ruling. It didn’t. Instead, the Government waited another three weeks to bring this issue to the Court’s attention. In the interim, it arrogantly assumed – without asking the Court – that it would have *over two months* to produce

the damage assessment to the Court for *in camera* review. The Government already notified ONCIX that ONCIX would have until 3 August 2012 to produce the damage assessment.

15. MAJ Fein's letter to ONCIX is telling. In his letter to the General Counsel at ONCIX, MAJ Fein states, "On March 23, 2012, the Court ruled that the Department of State's draft damage assessment was discoverable, *and did not rule on NCIX's draft.*" Government Notice Re: ONCIX Damage Assessment, attached letter from MAJ Fein to Tricia Wellman, May 24, 2012 (emphasis added). The reason that the Court "did not rule on NCIX's draft" was because the Government represented to the Court that ONCIX did not possess a draft damage assessment. MAJ Fein makes it look like this is simply an error on the Court's part, stating "the prosecution must notify the Court of the ... apparently inconsistency in the Court's order." To the extent that there is an "inconsistency" it is one which the Government created when it misrepresented to the Court on 21 March 2012 that ONCIX not have "any interim or final damage assessment in this matter."

16. As an ancillary note, MAJ Fein's letter to the General Counsel at ONCIX reveals that the Government has not yet started its *Brady* search with respect to the interim damage assessment. The General Counsel states that "we anticipate that a coordinated version will be available by July 13, 2012 and invite you to review the document on that date." Government Notice Re: ONCIX Damage Assessment, letter from Tricia Wellman to MAJ Fein, 30 May 2012. Thus, it appears that the Defense will not get *Brady* material from the ONCIX damage assessment, at the earliest, until early August.

17. The Defense predicts that the Government will try to define itself out of this self-created mess by arguing one of the following:

- a) That the Government said "ONCIX has not *produced* any interim or final damage assessments in this matter." (emphasis added). In other words, what it was saying was that there might have been an interim report, but that report had not yet been *produced* to the Government; or
- b) That the report that existed on 21 March 2012 was pre-interim (or, in the Government's words, it was a "working paper"), so it technically didn't fit the definition of "interim." The Government will then define "interim" to be distinct from "working paper" (which, of course, is distinct from "damage assessment" and which may or may not be distinct from a "draft"). It was abundantly clear what the Court was asking: did ONCIX have some document in existence that assessed the damage from the leaks? See Appellate Exhibit LXXII.

The Court should not permit the Government to wiggle its way out of what is clearly a misrepresentation to the Court and one of a long list of discovery violations.

### CONCLUSION

18. The Defense requests that this Court order the immediate production of the entire ONCIX

## INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

**USE OF FORM** - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

**COPIES** - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

**ARRANGEMENT** - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.

2. Judge advocate's review pursuant to Article 64(a), if any.

3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

4. Briefs of counsel submitted after trial, if any (Article 38(c)).

5. DD Form 494, "Court-Martial Data Sheet."

6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.

7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.